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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 307

MABEL V. ROMAN, Clerk of the Peace for New Castle County; WALTER A. HANDSBERRY, Clerk of the Peace for Kent County; I. ROBERT WILLEY, Clerk of the Peace for Sussex County; *et als., Appellants,*

v.

RICHARD SINCOCK, *et als.*

Appeal from the United States District Court for the District of Delaware

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the court below granting a limited stay (Appendix A(1), *infra*, pp. A1-A6) is reported at 207 F. Supp. 205. The opinion of the court below overruling the motion to dismiss (Appendix A(2), *infra*, pp. A6-A8) is reported at 210 F. Supp. 395. The opinion of the court below denying plaintiffs' motion for a preliminary injunc-

tion and denying defendants' motion for a further stay (Appendix A(3), *infra*, pp. A8-A16) is reported at 210 F. Supp. 396. The opinion of the court below holding unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States the apportionment provisions of the Delaware Constitution of 1897 and the apportionment amendment to the Delaware Constitution adopted in 1963, together with the concurring and dissenting opinions delivered there (Appendix A(4), *infra*, pp. A16-A67), are reported at 215 F. Supp. 169.

JURISDICTION

(i) This was an action brought pursuant to 28 U. S. C. §§1343 and 2281 and 42 U. S. C. §1983 to restrain enforcement of the apportionment provisions of the Constitution of Delaware, to restrain all further elections to the Delaware General Assembly, and to obtain a reapportionment of that body by Federal judicial decree, heard by a district court of three judges under 28 U. S. C. §2284.

(ii) (a) The final decree of the district court (Appendix B, *infra*, p. A68), declaring unconstitutional under the XIV Amendment both the apportionment provisions of the Delaware Constitution of 1897 and the 1963 reapportionment amendment to that Constitution, was entered on April 30, 1963. The notice of appeal from said final decree was filed in the court below on May 28, 1963.

(b) The injunction of the district court (Appendix C, *infra*, pp. A69-A70), enjoining the holding of any elections for members of the Delaware General Assembly under both of the foregoing provisions of the Delaware Constitution, was entered on May 20, 1963, on the district court's own motion, without notice or hearing. A motion to stay that injunction pending appeal was denied by the district court on June 10, 1963. The notice of appeal from the injunction and from denial of the motion to stay was filed in the court below on June 12, 1963.

(c) On June 27, 1963, Mr. Justice Brennan stayed the foregoing injunction "pending the perfection of the appeals and the final disposition of such appeals by this Court."

(d) Pursuant to this Court's Rule 15(3), both appeals are being treated as a single case.

(iii) The jurisdiction of this Court to review the decree and injunction below by appeal is conferred by 28 U. S. C. §1253.

(iv) The cases relied on to establish the substantiality of the questions presented by these appeals are *W.M.C.A., Inc.* v. *Simon*, No. 20, this Term; *Reynolds* v. *Sims*, No. 23, this Term; *Vann* v. *Frink*, No. 27, this Term; *Maryland Committee for Fair Representation* v. *Tawes*, No. 29, this Term; *McConnell* v. *Frink*, No. 41, this Term; and *Davis* v. *Mann*, No. 69, this Term, in each of which this Court noted probable jurisdiction on June 10, 1963.

(v) The provisions of the Delaware Constitution that the court below held violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, Section 2 of Article II of the Delaware Constitution of 1897, and the amendment thereto effected in 1963, are set out in full in Appendix D, *infra*, at pp. A71-A75 and A77-A81.

QUESTIONS PRESENTED

1. Does the Fourteenth Amendment to the Constitution of the United States preclude the State of Delaware from employing the Federal system of a House of Representatives based on population and a Senate based on equal representation for each county in constituting the General Assembly of the State?

2. Did the court below err in entering a blanket injunction restraining the holding of any election pertaining to the members of the General Assembly under the appor-

tionment provisions of the Delaware Constitution, both before and after the 1963 amendment thereto, on the ground that such constitutional provisions, which provided among other things for area representation in the Delaware Senate, and that did not conform to the apportionment guidelines for the Delaware House of Representatives formulated by the court below, were in consequence of both reasons violative of the Fourteenth Amendment to the Constitution of the United States?

3. Does the apportionment of the membership of the Delaware House of Representatives effected by the 1963 amendment to the Delaware Constitution violate the Fourteenth Amendment to the Constitution of the United States?

4. Does the apportionment of the membership of the Delaware Senate effected by the 1963 amendment to the Delaware Constitution violate the Fourteenth Amendment to the Constitution of the United States?

5. Does the Fourteenth Amendment to the Constitution of the United States require the General Assembly of the State of Delaware to be reapportioned according to the precepts, standards, principles and guidelines set forth and discussed in the opinion of the court below dated April 17, 1963?

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the Constitution of the United States and of the Constitution of Delaware involved in this case are set forth in Appendix D, *infra*, pp. A71-A81.

STATEMENT

This was an action by seven individuals, seeking to restrain the enforcement of the apportionment provisions of the Delaware Constitution of 1897 then in force, and asking in addition that the United States Court for the District of Delaware reapportion the legislature of that State,

brought against virtually every official of Delaware charged with responsibility for elections therein, including the Chancellor and the Judges of the Superior Court (who took no position on the merits of the case). While the action was pending, and under its impetus, two successive General Assemblies concurred in amending the State Constitution to effect a reapportionment.

Thereafter, the court below held unconstitutional under the Fourteenth Amendment both the apportionment provision of the 1897 Delaware Constitution as well as the amendment thereto effected in 1963; entered a decree to that effect; and later enjoined the holding of all elections to the General Assembly of Delaware under either constitutional provision. This injunction was thereafter stayed by the Circuit Justice; as will be pointed out below, pp. 19-21, the injunction and the decree together effectively preclude any amendment of the Delaware Constitution under either of the means prescribed by that instrument.

A. Delaware Apportionment When Suit Was Brought

Article II, Section 2, of the Delaware Constitution of 1897 (Appendix D, *infra*, pp. A71-A75), in force when the present action was commenced, divided the State into 17 Senatorial and 35 Representative Districts. Seven Senatorial Districts and ten Representative Districts each were assigned to Sussex County, to Kent County, and to rural New Castle County—"rural" in this connection means that portion of the latter county which excludes the City of Wilmington—while Wilmington was assigned two Senatorial and five Representative Districts (Pretrial Order, hereinafter "PTO", ¶¶C4-5). The debates in the 1897 Constitutional Convention show that this plan represented a compromise (PTO, ¶C10).

In 1897, the population of Delaware was about 180,000, of which Sussex County had 38,000, Kent County 32,000,

and New Castle County 105,000 (of whom 70,000 were in Wilmington and 35,000 in rural New Castle County) (PTO, ¶C9).

By 1960, the population of Delaware had risen to 446,292, divided as follows: Sussex County, 73,195; Kent County, 65,651; New Castle County, 307,446 (Wilmington, 95,827; rural New Castle County, 211,619) (PTO, ¶C13). By 1960, also, the population of the several Representative Districts varied from a low of 1,643 to a high of 58,228, while the Senatorial Districts ranged from 4,177 to 64,820 (PTO, ¶¶C14-17; Appendix A(4), *infra;* at pp. A22-A27).

B. Initial Steps in Present Action: Delaware Constitution Amended

The present action was brought on June 5, 1962 (*infra*, p. A14). It sought a declaration that the apportionment provisions of the Delaware Constitution of 1897 were unconstitutional; an injunction against the holding of any elections to the General Assembly; an order reapportioning the Representative and Senatorial Districts of Delaware according to population; or, alternatively, an order directing that the 1962 elections to the General Assembly be on an at-large basis.

On July 25, 1962, the court below stayed the proceedings until August 7. In its opinion (Appendix A(1), *infra*, pp. A1, A4-A5), rendered before any evidence was heard, the district court emphasized the need for haste, saying:

> "It is not necessary to state here fully the exigencies presented by the election laws of Delaware, constitutional provisions aside. The primary election this year must be held on the third Saturday in August: viz., on Saturday, August 18, 1962. It is necessary for the duly authorized officers of the political parties to notify the Department of Elections of the need for a primary election by the first Saturday in August; i.e., by Saturday, August 4, 1962. Publication of the time and places for holding primary elections must be made at least five days prior to the time the primary election

is to be held: i.e., probably as a practical matter by Saturday, August 11, 1962. If the Constitution is to be amended publication of the proposed amendment must be made by August 6, 1962. The sum of the foregoing is that definite and positive action should be taken by the present General Assembly prior to August 4, 1962, and must be taken by the present General Assembly no later than August 5, 1962, or nothing constructive can be accomplished, at least through the means of the legislative branch of our State Government without months if not years of futile delay: in all probability not until after the general election of 1966.

"We point out what we are sure will be obvious to the electors of this State that insofar as members of the General Assembly are concerned, if there is no valid primary election there can be no valid general election. Without a valid election law there can be no *de jure* elections either primary or general, insofar as membership in the General Assembly is concerned. Finally, and perhaps at the risk of needless repetition, we reiterate that if the apportionment provisions of Section 2 of Article 2 are held invalid, we can perceive difficulty in convening a *de jure* legislature. Without a *de jure* General Assembly it is difficult to perceive how valid legislative acts can be enacted. The unpleasant results would be far reaching."

The court below also suggested that the Delaware General Assembly amend the State Constitution so that apportionment would thereafter be regulated by statute rather than by constitutional provision, saying (p. A4, *infra*):

"Such an Amendment and such an Act would not only preserve the legislative system of Delaware and the rights of its electors while a permanent effective constitutional provision relating to apportionment could be worked out, but would also afford the State through its elected representatives the opportunity to pass a new apportionment act without undue delay in the event this or another court should declare the initial legislative apportionment statute enacted under such proposal not to be in conformity with the equal protection clause of the 14th Amendment.

> "Whether or not such a plan as outlined above is feasible and merits either consideration or adoption is exclusively within the province of the General Assembly."

Meanwhile, the Governor of Delaware had appointed a Bipartisan Reapportionment Committee (Tr. 526),[1] around July 5, 1962 (Tr. 592), which held a series of meetings from July 12 to 23, at the end of which time it presented its report (Tr. 528-536, 543-547; see Tr. 549-551, 559-564, 576-585, 589-590, for reasons underlying its recommendations, and Def. Ex. 1 for a record of its hearings). The chairman of that Committee testified (Tr. 585):

> "We felt this Court had a gun at the back of the General Assembly of Delaware, and we had better apportion the House of Representatives on a population basis under Baker versus Carr, and as fast as we could."

The portion of the Committee's report that dealt with an immediate plan of reapportionment became House Bill 574 to amend the State Constitution (Tr. 594) and was duly passed (Tr. 595), while another portion, which proposed to speed up the Constitutional provisions for the calling of a Constitutional Convention, failed to muster the requir[illegible] two-thirds majority (Tr. 594-596). House Bill 574 contained a provision, inserted by way of compromise, which left unchanged the representation formula prescribed by the existing Constitution for the composition of a Constitutional Convention (Tr. 596, 598-599; see Sec. 2B, *infra*, p. A81).

Thereafter, in conformity with the provisions of Art. XVI, Sec. 1, of the Delaware Constitution (Appendix D, *infra*, p. A76), the next General Assembly sitting after a general election had intervened again passed the reapportionment measure as House Bill 3, which became effective early in 1963. It is set out below at pp. A77-A81.

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[1] "Tr." refers to the transcript of evidence taken at the trial.

Briefly, the 1963 reapportionment adds one representative to each of two Representative Districts in Wilmington, one representative to one such District in rural New Castle County, two representatives to two such Districts, and three representatives to another. It made no changes in either Kent or Sussex Counties, so that the net result was to add 10 representatives from New Castle County to the lower house (PTO, ¶¶C21-22).

In the Senate, the amendment results in following the Federal pattern more closely, by giving each County seven senators; the additional members for Kent and Sussex are to be elected at large (PTO, ¶¶C23, 26).

For the effect of the amendment on the population of the several Representative and Senatorial Districts, see pp. A31-A35, *infra*.

The reasons underlying the 1963 reapportionment appear in the record as follows:

On the suggestion of a Wilmington member, the Committee decided to follow the Federal analogy (Tr. 580).

Accordingly, it was decided to retain a bicameral legislature with the Senate on a county basis, while Kent and Sussex were divided on an east-west basis to obtain two more floterial Senators from each without disturbing historical and traditional Senatorial Districts (Tr. 577, 581).

The House was reapportioned on a population basis (Tr. 577), with each existing Representative District retaining one representative, and with a reapportionment every 10 years (Tr. 549-551). After considering various figures (Tr. 559-560, 579), the Committee decided on 15,000 or a major fraction thereof as the limit of each Representative District, based on trends in population growth, the small size of the State, accommodations for the General Assembly, and in order to give a voice to all segments of society and to all practices and customs (Tr. 559-560). In leaving at least one Representative to each existing Representative

District, the Committee proceeded on the basis that, considering population trends, all Districts would soon grow to reach a major fraction of 15,000 (Tr. 561, 590-591).

C. Further Motions; Trial

Defendants' motions to dismiss were denied while the 121st General Assembly was in session, the court saying, among other things (*infra*, p. A8):

> "We wish to make it plain that we have no desire to substitute our judgment for the collective wisdom of the General Assembly of Delaware whose primary duty it is to assure the electors of this State apportionment provisions to meet the test laid down by the Supreme Court of the United States in Baker v. Carr, but in the light of all the circumstances we have no alternative but to proceed promptly."

Thereafter, following the passage on July 30, 1962, by the 121st General Assembly of House Bill 574, all the defendants on August 7 moved for a further stay to enable the 122nd General Assembly, coming into office on January 8, 1963, to be given the opportunity to concur therein and to make it effective as an amendment to the State Constitution.

Plaintiffs countered by asking a preliminary injunction to restrain the general election scheduled for November 1962, and by amending the prayers of their complaint to ask that the court declare the then proposed reapportionment amendment to the Delaware Constitution invalid on the same grounds as the original provision that it superseded.

The district court denied the motion for the preliminary injunction and likewise denied the motion for a stay (Appendix A(3), *infra*, pp. A8-A16), saying at pp. A15-A16:

> "We regret that the 121st General Assembly did not see fit to adopt the suggestion 'as a temporary haven, and not as an ultimate harbor'* made by us, that the

* [Note in original: "See 207 F. Supp. at pp. 206-207."]

embodiment of apportionment provisions be stricken out of the Constitution of Delaware by an amendment to Section 2 of Article II that would prescribe that the composition of the Senate and the House of Representatives of the General Assembly and the terms of office of its members in the future should be as provided by Act of the General Assembly; i. e., provided by statute and not by constitutional provisions. Had the General Assembly pursued the course suggested and proposed such an amendment the 122nd General Assembly would have been able to adopt it. If an apportionment statute, not meeting the standards of the Fourteenth Amendment, had then been enacted by the General Assembly, no further amendment to the Constitution of Delaware would have become necessary. Another statute satisfying the guarantees of the Fourteenth Amendment could simply have been passed. As things stand now, if Section 2 of Article II and the provisions of H.B. 574 be held unconstitutional, no new plan for the composition of the Senate and House of Representatives can be effected under the provisions of Section 1 of Article XVI by a General Assembly until 1965. This in effect leaves this court in a position where it must proceed promptly to adjudicate the merits of the controversy after full hearing."

Thereafter, following the formulation of a lengthy pretrial order, the trial began.

At the trial, plaintiffs below called only two witnesses.

One, Dr. Paul Dolan, Professor of Political Science at the University of Delaware (Tr. 29), expressed his belief (Tr. 34) "that the general axiom of one man, one vote should prevail"; that (Tr. 104) population should be the sole factor in any apportionment; that (Tr. 122) a unicameral legislature was best; and that (Tr. 141) Delaware did not need a bicameral legislature.

The other, Dr. Royce Hanson, Associate Professor of Government and Public Administration at American University (Tr. 147-148), is the President of the appellant

Committee in the Maryland reapportionment case here, *Maryland Committee on Fair Representation* v. *Tawes*, No. 29, this Term (Tr. 149-150), in which he seeks judicial approval for some of the views to which he testified, and in which he is intensely interested (Tr. 229-230).

The present appellants called Dr. James K. Pollock, Murfin Professor of Political Science at the University of Michigan (Tr. 328-329), who served as a member of the recent Constitutional Convention in Michigan (Tr. 331-332).

Briefly, Professor Pollock gave more weight to non-population factors in reapportionment, such as sectional interests, social and economic factors, natural resources, tradition, and history, than did the plaintiffs' witnesses (Tr. 333-339, 342, 370-371, 376, 383-384).

In our view, however, exposition in detail of the conflicting views of these three professors of political science would serve no purpose here, not only because one of them is an interested party in a related case, but primarily because those views go simply to the wisdom and desirability of different plans for apportionment. Moreover, most of what the professors said bears out the presiding judge's comment that "it is ceasing to be testimony and becoming a very interesting lecture in electoral machinery." (Tr. 434). Their aggregate "evidence", including colloquies, extends over nearly three-quarters of the transcript.

During the trial, the several professors were asked to comment on a reapportionment plan for the Delaware House of Representatives devised by the court (Court Ex. 4; Tr. 144-147, 168-169, 171-174, 207, 376-378), a plan which was shown to contain at least one arithmetical error (Tr. 704). The record suggests that this was originally a confidential document (Tr. 76-77). In fact it was presented to counsel by the presiding judge at the pretrial conference.

During the course of the trial, plaintiffs proposed a reapportionment plan of their own, based solely on popu-

lation for both houses, which provided for some at-large elections (Pl. Ex. 17-21; Tr. 210-226, 232-234, 296-301, 307-308, 314-316). Thereafter, following a discussion in which plaintiffs called attention to their prayer that the district court reapportion the Delaware legislature (Tr. 303-318), plaintiffs hastily rewrote their plan (Pl. Ex. 24-36; Tr. 664-665, 698, 703), at meetings at which one of the State's major political parties was unrepresented (Tr. 697, 707-709).

D. Counties in Delaware History and Law

The several professors of political science were generally unfamiliar with the history and traditions of the Delaware Counties (Tr. 64, 226-227, 366-376), which were brought to the attention of the court by the State Archivist, Mr. Leon de Valinger, Jr., a recognized authority on Delaware history (Tr. 447-515).

Those traditions had their beginnings in the early Dutch judicial districts in Delaware, of which there were two in 1673; these districts were perpetuated by the Duke of York when they passed out of Dutch hands forever in that year, and in 1680 the Duke created the third county (Tr. 453-454). In 1682, William Penn acquired all three, joined them to Pennsylvania, and in the next year gave them their present names (Tr. 454). Under Penn, the governmental powers and functions of the three counties were substantially expanded (Tr. 455-456).

Originally, the counties on the Delaware were not a separate colony, but shared representation with the other counties in the Pennsylvania Assembly, in which each county had equal county representation (PTO, ¶C40; Tr. 456-457). In 1704, the Delaware counties were granted a separate Assembly, again with equal county representation, but with the same governor as the Pennsylvania counties (PTO, ¶C41; Tr. 456-457). For the text of Penn's charter of 1701, which permitted within three years "a

distinct Assembly for the Territories", i. e., the counties on the Delaware, see 1 Thorpe, *The Federal and State Constitutions* (H. R. Doc. 357, 59th Cong., 2d sess.) 557, 561.[2]

After the Declaration of Independence, the Delaware Counties remained banded together in an Assembly, still with equal county representation (Tr. 460, 467), but sovereignty resided in each of the counties (Tr. 461). From July to September 1776, there was no executive (Tr. 467), and during that period some or all of the three Delaware counties could have joined Pennsylvania or Maryland or formed separate States (Tr. 286-287, 475).

In the early Journals of the Continental Congress, they are referred to in various ways: as "Delaware Counties" (1 J. Cont. Cong. 50; 2 *id.* 12), "the counties on Delaware" (4 *id.* 226), "3 counties" (1 *id.* 28, 29), "Lower Counties" (4 *id.* 400), "the Lower Counties on Delaware" (1 *id.* 82, 103; 2 *id.* 18; 3 *id.* 418, 429), "the Counties of New Castle, Kent and Sussex, on [or "upon"] Delaware" (1 *id.* 90, 105, 115; 3 *id.* 304, note 1), "the three lower counties on Delaware" (4 *id.* 68-69, 80), "the three lower counties of New Castle, Kent, and Sussex on Delaware" (1 *id.* 75-76; cf. 1 *id.* 80), "New Castle, Kent and Sussex on Delaware" (1 *id.* 14, 66), "the three lower counties on Delaware government" (4 *id.* 130, 132; cf. 5 *id.* 436, "counties on Delaware for the use of the militia of that government"), and, as the official name of this loose alliance, "The Government of the Counties of New Castle, Kent, and Sussex, upon Delaware" (Preamble to Del. Const. 1776, 1 Thorpe 562; see 1 J. Cont. Cong. 21). Prior to Statehood, the Journals of the Continental Congress contain only some scattered references to a "Delaware Government" (plate facing 1

[2] Hereinafter cited simply as "Thorpe". The pagination of the seven volumes of this work is consecutive, but in the interest of convenience, the volume number will be indicated in every instance.

J. Cont. Cong. 120; 1 *id.* 28; 3 *id.* 304; 4 *id.* 349, 413; 5 *id.* 436, 440, 631, 644).

We have found no references whatever, in any form of words, to the three counties *of* Delaware.

Then, in September 1776, the State of Delaware was created by a Constitutional Convention attended by ten delegates from each county (Tr. 467). It was not until then that the Journals of the Continental Congress refer to "Delaware State" (6 J. Cont. Cong. 1000, document dated Nov. 8, 1776).

Through successive Constitutions—1776, 1792, and 1831—the three counties were equally represented in the State legislature, each with three members in the upper house, called first the Council and then the Senate, and each having seven representatives in the lower house, called first the House of Assembly and then the House of Representatives. See Del. Const. 1776, Arts. 3 and 4 (1 Thorpe 562); Del. Const. 1792, Art. II, §§2, 3 (1 Thorpe 568, 570-571); Del. Const. 1831, Art. II, §§2, 3 (1 Thorpe 582, 584-585).

Not until the Constitutional Convention of 1852 was consideration given to increased representation for the City of Wilmington, and then the draft Constitution so providing was rejected by the people of Delaware (Tr. 470-471). It was 1897 before any Delaware Constitution deviated from the pattern of equal legislative representation for each county (*supra*, p. 5). Similarly, it was 1897 before any legislative representatives were elected from districts rather than at large from each county (Tr. 491, 514-515).

Counties have continued to be strong governmental units since the formation of the State in the Fall of 1776 (PTO, ¶¶C46-48). Under the statutes of the State, many of which are very old, Delaware counties exercise many functions; see the listing in the opinion below, *infra*, p. A39.

Throughout the trial, the presiding judge emphasized that "The terrible problem here is one of time" (Tr. 357),

repeating his expression about "a box of time" (Tr. 607, 608-609). Towards the close of the hearings, he indicated that the district court might have to draw up a reapportionment plan of its own (Tr. 737).

E. Opinion, Decree and Injunction Below

In a lengthy opinion (Appendix A(4), *infra*, pp. A16-A62), the district court held unconstitutional under the Fourteenth Amendment both the reapportionment provisions of the Delaware Constitution of 1897 and the reapportionment amendment effected in 1963, on the ground that neither plan had a rational or a reasonable basis. The court held that a variation between districts of 1 to 1½ represented the maximum population variance allowable under the Fourteenth Amendment to the Constitution of the United States, and, further, that the Equal Protection Clause required both houses of a State legislature to be apportioned according to population. Judge Biggs again emphasized the time element (*infra*, p. A55): "The State of Delaware, the General Assembly, and this court all seem to be trapped in a kind of box of time. The exigencies of the calendar and the oncoming general election of 1964 confront us."

Judge Layton, while concurring as to the House reapportionment, dissented as to the Senate, holding that area representation in one house is perfectly constitutional. However, he concurred in the result, on the ground that the 1963 amendment, which reapportioned both branches of the Delaware legislature, contained no separability clause. *Infra*, pp. A63-A67.

The court accordingly entered a final decree, holding unconstitutional both Delaware Constitutional apportionment provisions (Appendix B, *infra*, p. A68).

Then, although having said that (*infra*, p. A56) "we will allocate to the General Assembly a period of time from the date of our final decree up to and including

October 1, 1963, to prepare and enact into law a reapportionment statute acceptable under the law and the guidelines we have endeavored to lay down herein", and also "[h]aving the box of time in mind" (p. A56), the district court none the less, on May 20, 1963, on its own motion and without any hearing, entered an injunction against the holding of any election whatever to the General Assembly either under the apportionment provision of the Delaware Constitution of 1897 or under the apportionment amendment effective in 1963 (Appendix C, *infra*, pp. A69-A70). As will be shown below, pp. 19-21, this injunction effectively disables the State of Delaware from amending its Constitution by any of the methods prescribed therein.

A motion to stay that injunction pending appeal was denied by the district court on June 10, 1963, whereupon the present appellants, asserting that the injunction was improvident and that the denial of the motion to stay constituted an abuse of discretion, applied to the Circuit Justice. On June 27, 1963, Mr. Justice Brennan stayed the injunction "pending the perfection of the appeals and the final disposition of such appeals by this Court."

Notices of appeal from (a) the final decree, and (b) the injunction and the denial of the motion for a stay, were timely filed by all of the defendants except the Chancellor and the Judges. See this Court's Rule 46 (Summons and severance abolished).

THE QUESTIONS ARE SUBSTANTIAL

Inasmuch as the Court on June 10 last noted probable jurisdiction in the Alabama, Maryland, New York, and Virginia reapportionment cases, duly listed above at p. 3, ¶(iv), each of which also involves the question whether the Equal Protection Clause of the Fourteenth Amendment requires both houses of a State legislature to be apportioned according to population, the substantiality of the basic question presented by the present appeal is so obvious that no further argument on that score is necessary.

We therefore address ourselves to the proposition that this Delaware case should not be held to await the outcome of the others, but, because it presents a number of unique features, some or all of which are certain to affect the generalized principles to be drawn from and enunciated for the other cases, it should be fully heard by this Court, either immediately following or shortly after those others, and in any event before the basic issues are decided.

Those unique features are four in number. First, in Delaware, alone of the 50 States, the State was formed by the counties and not *vice versa*. Second, the injunction and decree entered in this case effectually prevent an amendment of the Delaware Constitution by the means prescribed therein. Third, the haste to reapportion by judicial decree that is plainly reflected in the record herein completely disregards the principles that this Court has enunciated for litigation involving a State of the Union. Finally, these appellants are prepared to adduce what up to now has not appeared in any similar case, viz., proof of contemporaneous Congressional construction of the Equal Protection Clause that regarded its provisions as amply satisfied by State constitutions which prescribed area apportionment for State senates.

We shall briefly summarize our conclusions and materials under each of the foregoing headings.

First. In Delaware the Counties made the State and not; as in the other States, *vice versa*. Consequently, one of the stock arguments currently being made against area apportionment in one house of a State legislature is obviously inapplicable here. As the history adduced at the trial has shown, *supra*, pp. 13-15, the Delaware Counties after July 1776 were at best a loose federation. They had an assembly composed of delegates from each of them, but no executive, with the result that sovereignty necessarily resided in each of the three constituent units. Contemporaneous references to them in the Journals of the

Continental Congress as—in variant forms—"the three lower counties on Delaware" make it plain that they were not regarded as forming an indivisible, unitary body. Significantly, the references are always to the counties *on* (or *upon*) Delaware, never to the counties *of* Delaware. Not until September 1776 did the three Delaware Counties, each sending ten delegates, hold a Constitutional Convention and create the State of Delaware.

Thus, whatever may be the case elsewhere, the Federal analogy is fully applicable to, and indeed was anticipated in, Delaware. Just as the several States, loosely allied under the Articles of Confederation, formed the present Federal Union in which each State, regardless of size, has equal representation in the Senate, so the three Lower Counties on the Delaware, loosely associated in an autonomous assembly that after July 1776 lacked any executive, but in which each county had had equal representation from the very beginning, formed a State in September 1776 in both houses of whose legislature, under successive Constitutions for more than a century and a quarter, each county was equally represented. We submit that it does violence to history, to Delaware tradition, and to American Federalism, now to suggest that equal county representation in today's Delaware Senate somehow violates fundamental law.

Second. If, as held by the court below, the apportionment provisions of the Delaware Constitution offend the Fourteenth Amendment; then, as can easly be demonstrated, the decree and injunction entered below (Appendices B and C, *infra*, pp. A68-A70) effectively preclude amendment of that instrument according to its terms.

Article XVI of the Delaware Constitution provides two methods of amendment. Section 1 (*infra*, p. A76), the mode employed in 1962-1963, provides for amendment by the General Assembly by a two-thirds vote of both houses, followed first by a general election, and then by a second

two-thirds vote of both houses of the newly elected General Assembly. Section 2 (*infra*, pp. A76-A77) provides for a Constitutional Convention, to be composed of one member from each representative district plus two additional members from each county.

The court below has effectively disabled the State of Delaware from amending its Constitution by either of those two methods.

(1) The present General Assembly sits until the general election in November 1964. Until that time it can, by a two-thirds vote, initially pass a new apportionment amendment. This amendment, to become effective, must then be similarly passed by the next succeeding General Assembly which will be elected in November 1964, and which will sit until November 1966. But, if the injunction entered below remains in force, no new General Assembly can be elected, and hence no new amendment to the Delaware Constitution can ever be adopted.

(2) The decree below (Appendix B, *infra*, p. A68) declared unconstitutional the apportionment provisions of the 1897 Constitution, Art. II, Sec. 2 (*infra*, pp. A71-A75), with its 35 representative districts, five senators each to Sussex; Kent, and rural New Castle, and two senators to Wilmington, on the footing that this arrangement is neither reasonable nor rational (Appendix A(4), *infra*, at pp. A40-A41). The constitutional convention provision of the same instrument, Art. XVI, Sec. 2 (*infra*, pp. A76-A77), provides for a convention of 41 members, 35 from the several representative districts, plus two from each of the three counties, and this was specifically continued by the 1963 amendment (*infra*, p. A81).

Plainly, if the legislative apportionment provision of the Delaware Constitution is unreasonable or irrational because of the current distribution of Delaware's population, then so is the constitutional convention apportionment provision; if the General Assembly because of mal-

apportionment cannot validly enact legislation, then the convention for the same reason cannot lawfully draft a new constitution. That was our adversaries' view below, see p. A3, *infra*; it seems now, following a full trial, to have been adopted by the district court (*infra*, p. A56).

The net of the foregoing is that a court of the United States, after declaring unconstitutional under the Constitution of the United States the apportionment provisions of a State Constitution, has effectually disabled the State from ever amending that instrument according to its terms. This, we submit, is more than an abuse of discretion. This is an abuse, a gross abuse, of judicial power.

Third. On any objective reading, this record reflects a dominant theme of pressure against a time limit wholly at variance with the principles that this Court has formulated to govern litigation involving States of the Union.

(1) Each of the opinions of the court below emphasizes, in one form or another, a spirit of haste; of pressure, and of let-us-get-on-with-it that permeated that court's approach to the grave problem of refashioning a State's Constitution; see the excerpts quoted at pp. 6-8, 10-11, 16-17, above. We submit that, notwithstanding the presiding judge's disclaimer (Tr. 600), the record amply confirms the view of the Chairman of the Governor's Bipartisan Reapportionment Committee (Tr. 585) that:

> "We felt this Court had a gun at the back of the General Assembly of Delaware, and we had better apportion the House of Representatives on a population basis under Baker versus Carr, and as fast as we could."

Indeed, the 1963 amendment, which was the result of less than three weeks' deliberation (*supra*, p. 8), bears on its face evidence of composition under pressure; obviously it was impossible to revise the existing Representative and Senatorial Districts in so short a time.

(2) All too plainly, the court below disregarded the principles that should govern litigation involving a State of the Union—and of course the decree and injunction here directly affect the State of Delaware regardless of the docket title of the cause.

In *Virginia* v. *West Virginia*, 220 U. S. 1, 36, this Court said:

> "A long time has elapsed. * * * But this case is one that calls for forbearance upon both sides. Great States have a temper superior to that of private litigants * * *."

Again, in *Virginia* v. *West Virginia*, 222 U. S. 17, 19-20, this Court said:

> "A question like the present should be disposed of without undue delay. But a State cannot be expected to move with the celerity of a private business man; it is enough if it proceeds, in the language of the English Chancery, with all deliberate speed. Assuming, as we do, that the Attorney General is correct in saying that only the Legislature of the defendant State can act, we are of opinion that the time has not come for granting the present motion. If the authorities of West Virginia see fit to await the regular session of the Legislature, that fact is not sufficient to prove that when the voice of the State is heard it will proclaim unwillingness to make a rational effort for peace."

See also *Virginia* v. *West Virginia*, 241 U.S. 531.

Those remarks were made in the controversy involving Virginia's effort to have West Virginia assume its rightful share of the combined States' pre-separation debt—a suit seeking simply a money judgment. See *Virginia* v. *West Virginia*, 238 U.S. 202, for the amount found due. Here, however, in a controversy revolving around the grave problem of a State's very structure of government, where, unlike *Watson* v. *City of Memphis*, 373 U. S. 526,

529, it cannot be said that "the governing constitutional principles no longer bear the imprint of newly enunciated doctrine", the court below, unmindful of the admonitions just quoted, and in the face of the novelty and weight of the mighty issues presented, issued on its own motion and without hearing argument, a peremptory injunction that not only paralyzed a State's electoral machinery but also effectively disabled it from ever amending its own Constitution.

(3) This Court in *Virginia* v. *West Virginia*, 246 U.S. 565, announced its power and determination to enforce a money judgment against a State of the Union. But, very plainly, such a step comes at the end of the judicial process, not to be lightly undertaken or even entertained, and in that instance happily proved unnecessary.[3]

Here, however, in a vastly more complex situation, where State reapportionment by Federal court decree necessarily involves a rewriting of a State constitution, and hence should have been the very last resort, the court below seems to have been irresistibly drawn to that course as the preferred first order of business, and this before any authoritative guidelines had been announced here.

Thus, at the very outset of the litigation, the district court undertook to advise the General Assembly how it should amend the State Constitution (*supra*, pp. 7-8; *infra*, p. A4), and then publicly regretted that its gratuitous ad-

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[3] See W. Va. Acts 1919 (Ex. Sess.), c. 10, providing for payment of judgment partly in cash and partly by bonds that Virginia had agreed to accept at par. For discussions of the enforcement problem, see Coleman, *The State as Defendant under the Federal Constitution*, 31 Harv. L. Rev. 210; Powell, *Coercing a State to Pay a Judgment*, 17 Mich. L. Rev. 1; Fischer, *Enforcement of a Money Judgment against a State*, 12 St. Louis L. Rev. 57; Good, *Judicial Determination of Interstate Disputes*, 26 Neb. L. Rev. 1; cf. Note, *The Virginia-West Virginia Debt Controversy*, 31 Harv. L. Rev. 1158.

vice had not been followed (*supra*, pp. 10-11; *infra*, pp. A15-A16); next, the district court devised a reapportionment plan of its own, and invited the parties to comment on it (*supra*, p. 12); thereafter, the district court invited the plaintiffs below, appellees here, to submit a plan of reapportionment, heard extensive testimony thereon (*supra*, pp. 12-13) and commented on that plan—and on the numerous errors therein—at some length in its final opinion (Appendix A(4), *infra*, pp. A57-A62); additionally, the district court set a deadline for the General Assembly to pass a reapportionment statute, (*infra*, pp. A56-A57), on the footing that there was no longer any valid provision in the Delaware Constitution regulating apportionment, this in the face of the circumstance that as a matter of political stability apportionment had been a constitutional matter in Delaware since 1776; and, finally, by preventing any amendment of the Delaware Constitution in the manner prescribed by that document, the court below virtually assured to itself the task of reapportioning the Delaware General Assembly by Federal judicial decree, a task which, indeed, the plaintiffs urged it to assume, and for which the presiding judge declared himself quite ready (Tr. 737; *accord*, pp. A56-A57, *infra*).

Except only for the pending proposal for a "Court of the Union" to be composed of the fifty Chief Justices of the States, which shall review the judgments of this Court, we know of nothing equally destructive of the State-Federal relationship requisite to the very existence of our Republic as the course so relentlessly pursued—and pressed—by the district court in this case.

Fourth. We are prepared to adduce materials bearing on the contemporaneous Congressional construction of the Fourteenth Amendment—and we emphasize Sec. 5 thereof, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article"—which demonstrate conclusively that a State constitution providing for area representation in the State Senate was never thought to violate the Equal Protection Clause at the time that

this Clause was first added to the Constitution of the United States.

(1) The Fourteenth Amendment was submitted to the States by Joint Resolution of June 16, 1866, No. 48, 14 Stat. 358, and was proclaimed a part of the Constitution in July 1868. See Proc. No. 11, July 20, 1868, 15 Stat. 706; Proc. No. 13, July 28, 1868, 15 Stat. 708. In the same year, 1868, Congress provided for the readmission of certain former Confederate States that had been subject to the Reconstruction Acts[4] on condition that each ratify the Fourteenth Amendment. Act of June 25, 1868, c. 70, 15 Stat. 73 (Alabama, Florida, Georgia, Louisiana, North Carolina, South Carolina); cf. Act of June 22, 1868, c. 69, 15 Stat. 72 (Arkansas, which had already ratified). Two years later, three other former Confederate States that had similarly been under the Reconstruction Acts were separately readmitted. Act of Jan. 26, 1870, c. 10, 16 Stat. 62 (Virginia); Act of Feb. 23, 1870, c. 19, 16 Stat. 67 (Mississippi); Act of March 30, 1870, c. 39, 16 Stat. 80 (Texas).

(2) The new constitutions of five of the foregoing States did indeed provide for the apportionment of both houses of the legislature on a basis of population. Ala. Const. 1867, Art. VIII, §§1, 3 (1 Thorpe 132, 145-146); Ark. Const. 1868, Art. V, §8 (1 Thorpe 306, 310-311); Miss. Const. 1868, Art. IV, §§34, 35 (4 Thorpe 2069, 2074); N. C. Const. 1868, Art. II, §§5, 6 (5 Thorpe 2800, 2804); Tex. Const. 1868, Art. IV, §11 (6 Thorpe 3591, 3594-3595).

The new constitutions of three other readmitted States assigned senators by districts; the extent to which their provisions in that regard reflected population, or emphasized area primarily, or what weight they gave to those two factors or to others, is not clear from the face of the documents. Fla. Const. 1868, Art. XIV, §2 (2 Thorpe 704, 719); La. Const. 1868, Tit. II, §22 (3 Thorpe 1449, 1451-

[4] Tennessee, which had been restored by the Joint Resolution of July 24, 1866, No. 73, 14 Stat. 364, escaped Reconstruction.

1453); Va. Const. 1870, Art. V, §3 (7 Thorpe 3871, 3882-3883).

But two of the newly admitted States had adopted constitutions that plainly provided for area representation in one house of the legislature. Georgia's constitution allowed one senator for each district of three contiguous counties, quite unrelated to population. Ga. Const. 1868, Art. III, §2 (2 Thorpe 822, 827-828). South Carolina adopted a constitution in which each county was entitled to one senator, the only nod to population being that Charleston County alone was given two. S. C. Const. 1868, Art. II, §8 (6 Thorpe 3281, 3286).

(3) It is thus apparent that, by admitting these formerly seceded States, the Congress nearest in time to the adoption and ratification of the Fourteenth Amendment interpreted the Equal Protection Clause as not "to prevent the making of social experiments that an important part of the community desires, in the . . . sulated chambers afforded by the several States" (Holmes, J., in *Truax* v. *Corrigan*, 257 U. S. 312, 344), where such social experiments involved area representation in one house of the State legislature. For the statute book makes it clear that Congress scrutinized the new constitutions of the former Confederate States with great care. See the proviso to Sec. 1 and see Sec. 3 of the Act of June 25, 1868, *supra*, 15 Stat. 73, 74, requiring Georgia to annul certain subsections of its constitution as a further prerequisite to readmission; Sec. 8 of the Act of Dec. 22, 1869, c. 3, 16 Stat. 59, 60, requiring ratification by Georgia of the Fifteenth Amendment; and the several provisos to the Virginia, Mississippi, and Texas readmission Acts, *supra*, 16 Stat. at 63, 68, and 81.

Very plainly, therefore, if the Congresses that imposed such requirements had considered Georgia's plan of giving one senator to every three counties regardless of population to be violative of the Equal Protection Clause, or had similarly regarded as contravening that Clause South Carolina's scheme of one senator for each county (with but a single exception), it would necessarily have insisted

that those provisions, also, be expunged or altered. Having regard to the temper of the times, it cannot be supposed for one moment that, if the Reconstruction Congresses had ever considered area representation in one house of a State legislature to constitute a denial of the equal protection of the laws, they would ever have readmitted Georgia—much less South Carolina, which had been first to secede and first to fire on the flag.

From this it necessarily follows that the statement in *MacDougall* v. *Green*, 335 U. S. 281, 283, that "To assume that political power is a function exclusively of numbers is to disregard the practicalities of government," correctly reflects the original understanding and interpretation of the Equal Protection Clause; and that the view of the court below, that this Clause requires both houses of a State legislature to be apportioned according to population, represents a neo-egalitarian revelation never vouchsafed to the contemporaries of the enactment, ratification, and initial implementation of the Fourteenth Amendment.

Certainly it would be incongruous if the concept of area representation that is not only the basis of our Federal Union but indeed is specifically protected against change by Article V of the United States Constitution, should, when adopted by a constituent State of that Union as the basis of its own political structure, be held to violate the Fourteenth Amendment of the same Constitution. Yet, as Judge Layton pointed out in his dissent (*infra*, pp. A65-A66), the holding of the majority below necessarily means that the constitutional guarantee of two senators to every small State simultaneously violates the constitutional guarantee of the equal protection of the laws to the people of every large State.

We cannot forbear to remark that it would surely be ironic if, now that State legislation has at long last been freed from inflexible interpretations of the Due Process Clause, see *Ferguson* v. *Skrupa*, 372 U. S. 726, State constitutional provisions should in turn become fettered by equally inflexible interpretations of the Equal Protection

Clause that, as here (see Appendix A(4), *infra*, at pp. A35-A37), would irrevocably subject the few and the poor to the domination of the rich and the many.

What this Court said on this point in *MacDougall* v. *Green*, 335 U. S. 281, 284, is, we submit, just as sound today in law and in fact both as when it was written:

> "It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. The Constitution—a practical instrument of government—makes no such demands on the States."

We add only that, so far as we are aware, no court in controversies involving apportionment of a State Senate has troubled to look to contemporaneous Congressional interpretation of the Equal Protection Clause as shown by the readmission of the former Confederate States.

Fifth. Accordingly, the present case should be set down for argument and not simply held to await the outcome of the others, since what has been said strongly suggests that general principles drawn from the records and historical backgrounds in these other cases may require significant modification or qualification in the light of the factors now presented here.

We would undertake to proceed on simultaneous briefs, either on the unprinted record or on an initially abbreviated record, to be supplemented after argument.[5]

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[5] The Appendices to the present Jurisdictional Statement contain all of the opinions, the last of which includes the findings and conclusions below, and hence most of the materials for decision. The complaint with amendments and the pretrial order could easily be printed while the briefs are being prepared. The balance of the record designated by the parties could then be made available in printed form soon after argument.

In any event, the present case contains so many novel and different features, all of which bear materially on the other cases, that those others should not be decided until after this one has first been briefed and argued.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that probable jurisdiction of this appeal should be noted, and that it should be set down for argument with, or very shortly after, the other reapportionment cases involving the composition of State senates.

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JULY 1963.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 307

MABEL V. ROMAN, Clerk of the Peace for New Castle County; WALTER A. HANDSBERRY, Clerk of the Peace for Kent County; L. ROBERT WILLEY, Clerk of the Peace for Sussex County; *et als., Appellants,*

v.

RICHARD SIXCOCK, *et als.*

Appeal from the United States District Court for the District of Delaware

APPENDICES TO JURISDICTIONAL STATEMENT

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APPENDICES TO JURISDICTIONAL STATEMENT

APPENDIX A

OPINIONS BELOW

(1) Opinion Granting Limited Stay (207 F.Supp. 205)

United States District Court D. Delaware.

Civ. A. No. 2470.

RICHARD SINCOCK ET AL., *Plaintiffs*,

v.

CHARLES L. TERRY ET AL., *Defendants*.

July 25, 1962.

Before BIGGS, Circuit Judge, and WRIGHT *and* LAYTON, District Judges.

PER CURIAM.

In Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), the Supreme Court of the United States held that a court such as this had the jurisdiction to and must determine whether or not the apportioning of members of a state general assembly or legislature by geographical units offends the constitutional rights of the electors of the state under the equal protection clause of the Fourteenth Amendment of the Constitution of the United States because of an alleged debasement of their voting rights. This in substance constitutes the issue presented by the complaint at bar.

Section 2 of Article 2 of the Constitution of Delaware of 1897, Del.C.Ann. prescribes the Senatorial and Representative Districts of this State by geographical boundaries irrespective of the number of persons contained therein. Thus the ultimate issue before this court is whether or not Section 2 of Article 2 of the Constitution of Delaware con-

travenes the equal protection provision of the Fourteenth Amendment to the Constitution of the United States.

If this court should hold that the plaintiffs in the case at bar, and those similarly situated, all electors of the State of Delaware, are deprived of their rights under the Constitution of the United States by Section 2 of Article 2 of the Delaware Constitution, and entered a judgment to that effect, the present General Assembly and any subsequent General Assembly, the members of which were elected pursuant to Section 2 of Article 2, might be held not to be a *de jure* legislature and its legislative acts might be held invalid and unconstitutional. If such a judgment were entered by this court prior to any action taken by the present General Assembly to amend Section 2 of Article 2, there might be no *de jure* General Assembly that could effect a valid constitutional amendment, call validly for a Constitutional Convention, or even pass a valid statute. Without hearing the case at bar on the merits we cannot, of course, presently express any opinion as to the constitutional validity of Section 2 of Article 2 of the Delaware Constitution, and expressly do not do so. But the situation obviously is one clearly fraught with great danger to the people of this State.

The report of Delaware's Bipartisan Committee upon a plan for the reapportionment of its General Assembly and for the convening of a Delaware Constitutional Convention with drafts of bills was presented to the court by counsel for the moving parties and it was agreed by all counsel that the report and its accompanying bills were as presented to the Honorable Elbert N. Carvel, Governor of Delaware. It was also agreed by all counsel that the Governor has recalled the General Assembly for action in respect to matters referred to in the report on Friday, July 27, 1962. The report and exhibits represent many hours of industrious work by the Committee. But as the Committee con-

cedes in its report the recommendations represent a compromise of divergent views.

The report recommends (A) a constitutional amendment to Article 2, Section 2 of the Delaware Constitution by act of the General Assembly passed by that body in time to comply with the publication provisions of the Constitution relative to constitutional amendments, allotting senatorial representation on a geographical basis and allotting representation in the lower house on a predetermined population basis; and, (B) immediately after the enactment of the legislation recommended in (A) the passage of an amendment to Article 16, Section 2 accelerating the date on which a constitutional convention can be held to the middle of 1963, the election of delegates thereto, however, being based upon the present geographical apportionment of representation.

We do not and cannot express any opinion whatsoever respecting the validity of the proposed legislation recommended under (A) by the Committee, but lurking in the background is the possibility that this court or the Supreme Court might be compelled in the light of Baker v. Carr, supra, to find the proposed legislation as contravening the equal protection clause of the 14th Amendment.

With respect to (B) and the Constitutional Convention to be held in conformity with the proposed amendment, the plaintiffs assert that delegates selected to participate in that convention, based upon the present geographical apportionment of representation, would also be subject to attack because of constitutional infirmity. Again, we cannot and do not express any opinion as to the merits of the plaintiffs' position. We merely allude to this to indicate the vast amount of complex and time consuming litigation which may be encountered in this or some other court before a legally unassailable Constitutional Convention could be held.

With the foregoing observations uppermost in the Court's thinking at this juncture of the proceedings and at the risk of being accused, possibly with some merit, of being presumptuous, we nevertheless think that it might be of some benefit to those we hold should initially consider the problem giving rise to this litigation to point out the possibility as a temporary haven, and not as an ultimate harbor, the embodiment of apportionment provisions by an amendment to Section 2 of Article 2 of the Delaware Constitution to prescribe that the composition or apportionment of the Senate and the House of Representatives of the General Assembly, the terms of office of its members, in the future should be as provided by an Act of the General Assembly; i. e., provided by statute and not by constitutional provision. Such an Amendment and such an Act would not only preserve the legislative system of Delaware and the rights of its electors while a permanent effective constitutional provision relating to apportionment could be worked out, but would also afford the State through its elected representatives the opportunity to pass a new apportionment act without undue delay in the event this or another court should declare the initial legislative apportionment statute enacted under such proposal not to be in conformity with the equal protection clause of the 14th Amendment.

Whether or not such a plan as outlined above is feasible and merits either consideration or adoption is exclusively within the province of the General Assembly.

It is not necessary to state here fully the exigencies presented by the election laws of Delaware, constitutional provisions aside. The primary election this year must be held on the third Saturday in August: viz., on Saturday, August 18, 1962. It is necessary for the duly authorized officers of the political parties to notify the Department of Elections of the need for a primary election by the first Saturday in August; i. e., by Saturday, August 4, 1962. Publication of the time and places for holding primary elections must be

made at least five days prior to the time the primary election is to be held: i. e., probably as a practical matter by Saturday, August 11, 1962.[1] If the Constitution is to be amended publication of the proposed amendment must be made by August 6, 1962. The sum of the foregoing is that definite and positive action should be taken by the present General Assembly prior to August 4, 1962, and must be taken by the present General Assembly no later than August 5, 1962, or nothing constructive can be accomplished, at least through the means of the legislative branch of our State Government without months if not years of futile delay: in all probability not until after the general election of 1966.

We point out what we are sure will be obvious to the electors of this State that insofar as members of the General Assembly are concerned, if there is no valid primary election there can be no valid general election. Without a valid election law there can be no *de jure* elections either primary or general, insofar as membership in the General Assembly is concerned. Finally, and perhaps at the risk of needless repetition, we reiterate that if the apportionment provisions of Section 2 of Article 2 are held invalid, we can perceive difficulty in convening a *de jure* legislature. Without a *de jure* General Assembly it is difficult to perceive how valid legislative acts can be enacted. The unpleasant results would be far reaching.

In view of what we have already said, we deem it desirable and a proper exercise of our discretion to stay these proceedings in the hope and expectation that some appropriate action may be taken by the 121st General Assembly.

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[1] See Sections 3102 and 3103 of Title 15, Delaware Code Annotated, as amended by Sections 1 and 7, Ch. 426, 50 Delaware Laws; Section 3108 of Title 15, Delaware Code Annotated, as amended by Section 10, Ch. 426, 50 Delaware Laws; and Section 3110 of Title 15, Delaware Code Annotated, as amended by Section 2, Ch. 107, 51 Delaware Laws.

Since, if an amendment to the Constitution is proposed by the necessary two-thirds vote of both houses of the General Assembly, under the provisions of the Delaware Constitution, the Secretary of State must publish the proposed amendment in three newspapers in each county at least three months prior to the next general election, it would serve no useful purpose to grant a stay at this time beyond August 7, 1962. This is necessarily so since the general election this year falls on November the sixth, and the last possible date for publication of the proposed amendment, assuming our calculations are correct, as provided by the Constitution, would be August 6.

A stay of these proceedings will therefore be granted until August 7, 1962. We shall, however, proceed with the other motions now scheduled for argument on August 2, 1962, at 2:30 P.M., D.S.T. We will enter no order on these motions until after the passage of the date and time first stated in this paragraph.

(2) Opinion Overruling Motions to Dismiss (210 F.Supp. 395)

United States District Court D. Delaware.

Civ. A. No. 2470.

RICHARD SINCOCK ET AL., *Plaintiffs*,

v.

CHARLES L. TERRY ET AL., *Defendants*.

Aug. 7, 1962.

Before BIGGS, Circuit Judge, and WRIGHT and LAYTON, District Judges.

PER CURIAM.

A number of motions have been filed by the defendants, including motions to stay the proceedings at bar, to dismiss the action as to certain defendants for failure to state a

cause of action or for want of equity, and to compel a more definite statement as to the nature of the cause of action asserted in the complaint. On July 25, 1962, the proceedings were stayed until August 7, 1962 for the reasons stated in our *per curiam* opinion filed on the day first mentioned. On August 2, 1962, briefs having been filed, argument was had on the motions. Their merits have now been carefully considered and weighed.

As to the motions to dismiss as parties defendant, the Superior Court, as specially constituted by 15 Del.C. §.5701, to perform the duties imposed by Section 6 of Article V of the Constitution of Delaware, Del.C.Ann. and the Judges of the Superior Court, we are of the opinion, as presently advised, that they are proper, if not necessary, parties to the suit at bar.

As to the motions to dismiss the action for failure to state a claim, we hold that the complaint sets out a cause of action cognizable in this court in that it alleges that the apportioning or selecting of members of the General Assembly of Delaware offends the voting rights of the electors of this State under the Fourteenth Amendment of the Constitution of the United States. Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). The motions to dismiss for want of equity must also be denied. It would be premature at this time to inquire into the nature of the relief which could or should be granted under the allegations of the complaint. We shall not pursue such an inquiry now.

We are also of the opinion that the allegations of the complaint set out the cause of action just indicated with sufficient clarity and definiteness to require the defendants to answer.

Accordingly all motions made by the defendants will be denied. Answers shall be filed as required by Rule 12(a)(1) Fed.R.Civ.Proc. 28 U.S.C.

We wish to make it plain that we have no desire to substitute our judgment for the collective wisdom of the General Assembly of Delaware whose primary duty it is to assure the electors of this State apportionment provisions to meet the test laid down by the Supreme Court of the United States in Baker v. Carr, but in the light of all the circumstances we have no alternative but to proceed promptly.

An appropriate order will be filed concurrently with the handing down of this opinion.

(3) Opinion Denying Preliminary Injunction and Denying a Further Stay (210 F.Supp. 396)

United States District Court D. Delaware.

Civ. A. No. 2470.

RICHARD SINCOCK ET AL., *Plaintiffs*,

v.

CHARLES L. TERRY ET AL., *Defendants*.

Oct. 16, 1962.

Before BIGGS, Circuit Judge and WRIGHT and LAYTON, District Judges.

PER CURIAM.

The suit at bar is a class action brought by the plaintiffs on their own behalf and on behalf of all other persons similarly situated. The plaintiffs assert variously that they are residents of four representative districts and four senatorial districts of the State of Delaware and are duly qualified voters and taxpayers of the State and citizens of the United States. The defendants comprise the Boards of Canvass, the Clerks of Peace, the Departments of Election, and their Secretaries, of New Castle, Kent and Sussex

Counties respectively, and the State Election Commissioner, all of whom perform statutory and constitutional duties relating to the conduct of the general elections in the State of Delaware.

The cause of action, both under the original complaint and an amendment thereto hereinafter referred to, arises under the Constitution and laws of the United States; the Fourteenth Amendment to the Constitution of the United States, 42 U.S.C. §§ 1983 and 1988. See also 28 U.S.C. §§ 1343 and 2201. Under the complaint as originally filed, as we held in our first opinion in this case, D.C., 207 F.Supp. 205 (1962), the issue presented is whether or not the apportioning of members of the General Assembly of Delaware by geographical units pursuant to Section 2 of Article II of the Constitution of Delaware of 1897, Del.C.Ann. offends the constitutional rights of the electors of this State under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States because of alleged debasement of their voting rights.

The plaintiffs ask us to declare Section 2 of Article II of the Constitution of Delaware to be unconstitutional and invalid for the reason just stated; to enjoin the defendants from conducting, canvassing, or otherwise engaging in any general election for the election of members of the House of Representatives or of the Senate of the General Assembly pursuant to the provisions of Section 2 of Article II of the Constitution of Delaware; to enter an order reapportioning the representative and senatorial districts of Delaware in accordance with the population of the State and the provisions of Section 3 of Article I of the Constitution of Delaware to provide for free and equal elections; or, to enter an order directing the conduct of the general election to be held on November 6, 1962 for Representatives and Senators in the General Assembly but on an at-large basis; and for other relief.

On July 25, 1962 we stayed the proceedings until August 7, 1962 in order to permit the 121st General Assembly to

take such action as it deemed appropriate by way of amendment to Section 2 of Article II of the Constitution of Delaware. On July 30, 1962 the 121st General Assembly enacted a proposed amendment to the Constitution of Delaware, now embodied in H.B. 574, which, if agreed to by the 122nd General Assembly, would amend Section 2 of Article II of the Constitution to provide a new composition of the House and Senate of the General Assembly. Publication of the proposed amendment has been made in accordance with Section 1, Article XVI of the Constitution. The first step to effect an amendment to Section 2 of Article II has therefore been taken.

On August 7 the defendants moved for a further stay asserting in substance that the 122nd General Assembly, coming into office on January 8, 1963, should be given the opportunity to agree to the amendatory provisions to Section 2, Article II, proposed by the 121st General Assembly. We took this motion under consideration.

On August 8 the plaintiffs moved for a preliminary injunction to enjoin the defendants from conducting the General Election scheduled for November 6, 1962 insofar as it pertains to the election of members of the General Assembly.

On October 8, 1962, the plaintiffs amended the prayers of their complaint to ask that we provisionally reapportion the House of Representatives and the Senate and declare H.B. 574 to be unconstitutional for the same reasons as asserted for the invalidation of Section 2 of Article II of the Constitution.

Hearings and arguments have now been had on the motions to further stay the proceedings and for a preliminary injunction. The validity of Section 2 of Article II and of the provisions of H.B. 574 is presently before this court. Cf. Sims v. Frink, 205 F.Supp. 245 (D.C.Ala.1962). The defendants have filed answers but, in replying to many

vital allegations of the complaint, they assert that they do not possess sufficient knowledge or information to form a belief as to the truth of the matters alleged. Some of the defendants admit the accuracy of the allegations as to population figures set out in paragraphs 21 to 25 inclusive of the complaint which, seemingly, find support in the exhibits attached to the complaint. Other defendants do not make such admissions. The defendants deny that irreparable damage will inure to the plaintiffs if this court fails to enjoin the election of November 6, 1962 in respect to the election of members of the General Assembly.

The plaintiffs by charts and other exhibits, explained at the hearing, show the population of the election districts of the State of Delaware, the geographical boundaries of the districts and the counties, and have put before the court various other data which may be relevant. By the deposition of Dr. Paul Doian and the evidence of others they seek to establish invidious discrimination in the method of selection of members of the General Assembly as presently required by Section 2 of Article II and under the method of selection proposed by H.B. 574. The plaintiffs assert that the discrimination demonstrated by both Section 2 of Article II and by H.B. 574 is such as to destroy any claim of rationality as to the apportionment of the General Assembly. Some defendants contend that the present election districts are justified by historical, economic, geographic and topographic factors. The position of other defendants in this respect is not clear. Certain defendants[1] claim that the provisions of H.B. 574 constitute

[1] The Chancellor of Delaware and the Judges of the Superior Court of the State of Delaware, all members of the Boards of Canvass, state in their answers that as judicial officers serving in ministerial capacities they deem it inappropriate to take a position on the merits of this lawsuit but aver that as Chancellor of Delaware or as Judges of the Superior Court they will continue to discharge the duties imposed upon them by the Constitution of the State of Delaware unless restrained by a lawful order of this Court.

a rational basis of representation in the General Assembly, both in House and Senate, and the charge of invidious discrimination or debasement of voting rights in respect to H.B. 574 cannot be maintained. Cf. Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663. The defendants, however, do not present any substantial evidence to support their respective positions, though as we have indicated they controvert what may be vital operative facts asserted by the plaintiffs. In short, we have a situation where the plaintiffs contend that the population figures demonstrate invidious discrimination and many defendants claim, at least insofar as H.B. 574 is concerned, that apparent discrepancies and disparities of electors' rights are not sufficient to overthrow the presumption of constitutionality.

We recognize of course that a statute must be presumed to be constitutional and that a state constitution may be deemed to be endowed with an even stronger presumption of constitutionality, and that he who would attack successfully the constitutionality of either statute or constitution must bear a very heavy burden. Dartmouth College v. Woodward, 4 Wheat. 518, 17 U.S. 518, 4 L.Ed. 629 (1819). If the verity of all of the operative facts presented by the plaintiffs on the instant record be assumed and the ultimate conclusions of mixed law and fact drawn by the plaintiffs therefrom were presumed to be accurate it might be concluded that the plaintiffs had made a showing of invidious discrimination as to the provisions of Section 2 of Article II and of H.B. 574 as well, and a court would be compelled to hold that the presumption of constitutionality would fall and that invidious discrimination would be established.

It is the law of this Circuit and of this District, however, that a party seeking a preliminary injunction must allege facts as to which there is no serious dispute as well as showing a reasonable probability of success on final hearing. See Vanadium Corp. of America v. Susquehanna Corp., 203 F.Supp. 686, 697 (D.C.Del.1962), and the cases cited in note 90 cited to the text. In the case at bar there is, in

our opinion, a serious dispute as to operative facts but also, and this is of peculiar importance in the instant case, there is a very strong dispute as to the ultimate facts and the conclusions to be drawn therefrom. Counsel and the court are moving forward into uncharted legal territory.

It is of course horn-book law that a preliminary, or interlocutory, injunction may not be granted unless the denial thereof would cause "irreparable injury". Doctor Dolan, the plaintiffs' own expert witness, stated his conclusion that an election held under the present constitutional system would not cause him irreparable injury.[2] We cannot regard Doctor Dolan's remark as facetious though we agree with him that most of us enjoy living in the State of Delaware today. The plaintiffs, however, contend that to deprive a man of equality of franchise is the same as depriving him of his vote altogether and that the record demonstrates that a vote of some of the electors in New Castle County has become thirty-five times as effective as the vote of certain other electors in that County. But while extent of dilution of franchise is a very relevant factor there are many others to be considered and the record as we have indicated seems to us at the present times to be inadequate. The issues with which we are concerned are of the gravest importance to the people of this State and constitutional questions should be decided only upon a full record. Villa v. Van Schaick, 299 U.S. 152, 155-156, 57 S.Ct. 128, 81 L.Ed. 91 (1936); Honeyman v. Hanan, 300 U.S. 14, 25-26, 57 S.Ct. 350, 81 L.Ed. 476 (1937); and Lathrop v. Donohue, 367 U.S. 820, 845-846, 81 S.Ct. 1826, 6 L.Ed. 2d 1191 (1960).

Moreover the dilution and debasement of franchise in the State of Delaware seems to have developed—though of this again we cannot be sure on the present record—since the adoption of the Constitution of 1897. This ap-

[2] See Dolan deposition, p. 64.

parently is the position taken by the plaintiffs.[3] The dilution and debasement of electors' rights has increased apparently year by year. It is worse this year probably than it was in 1960 and was certainly worse in 1960 than in 1950. These are facts of general knowledge of which we can take judicial notice. But generally speaking the disease of dilution has not progressed very much further today than it had at the time of the election of November 1960 and probably will not progress with great rapidity over the next six months. The decision of the Supreme Court in Baker v. Carr, supra, was on March 26, 1962. The suit at bar was filed on June 5, 1962 and has been proceeded with with a celerity consonant with the importance and intricacy of the issues involved. We cannot find on this record that the plaintiffs and others situated like unto them will suffer irreparable damage if we do not enjoin the election of November 6, 1962 insofar as it relates to the election of members of the General Assembly. On the contrary, if we enjoin the election of November 6, 1962, we will have to substitute, in lieu of the provisions of Section 2 of Article II, an apportionment plan, election laws or rules and regulation devised by ourselves. Though the plaintiffs have suggested a plan for equalization of franchise the subject is one which requires careful study, further development by expert witnesses and the opportunity for extensive cross-examination by the parties and exploration by the court. A different and new apportionment system perhaps cannot be devised as quickly and as simply as the plaintiffs assert. If we were to enjoin the forthcoming election of November 6 for members of the General Assembly to be held under present constitutional provisions without substituting therefor an adequate redistricting plan and clear and sufficient instructions to the defendants in the instant

[3] Plaintiffs' requests for findings of fact contain the following statement: "16. The Constitution of the State of Delaware of 1897 created 35 representative districts. The population in each of the 35 districts thereby created was substantially equal * * * ".

case it would have a most disastrous effect and might deprive large numbers of electors of the State of Delaware of their franchise on November 6 to elect members of the General Assembly. This we will not do. On this ground alone, if there were no other, we would deny the application for a preliminary, or interlocutory, injunction.

The foregoing is deemed to constitute the findings by the court required by Rule 52(a), Fed.R.Civ.Proc., 28 U.S.C.

We will deal now with the application for a further stay. It is obvious from what we have stated that in our opinion most serious questions of constitutionality are involved in respect to Section 2 of Article II and H.B. 574. We regret that the 121st General Assembly did not see fit to adopt the suggestion "as a temporary haven, and not as an ultimate harbor"[4] made by us, that the embodiment of apportionment provisions be stricken out of the Constitution of Delaware by an amendment to Section 2 of Article II that would prescribe that the composition of the Senate and the House of Representatives of the General Assembly and the terms of office of its members in the future should be as provided by Act of the General Assembly; i. e., provided by statute and not by constitutional provisions. Had the General Assembly pursued the course suggested and proposed such an amendment the 122nd General Assembly would have been able to adopt it. If an apportionment statute, not meeting the standards of the Fourteenth Amendment, had then been enacted by that General Assembly, no further amendment to the Constitution of Delaware would have become necessary. Another statute satisfying the guarantees of the Fourteenth Amendment could simply have been passed. As things stand now, if Section 2 of Article II and the provisions of H.B. 574 be held unconstitutional, no new plan for the composition of the Senate

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[4] See 207 F.Supp. at pp. 206-207.

and House of Representatives can be effected under the provisions of Section 1 of Article XVI by a General Assembly until 1965. This in effect leaves this court in a position where it must proceed promptly to adjudicate the merits of the controversy after full hearing. Accordingly the application for further stay must be denied. A date will be fixed for pretrial hearing in the near future and a time will be set for trial on the merits as soon thereafter as is feasible after consultation with counsel.

An order will be entered concurrently with this opinion.

(4) Opinion on the Merits, Following Trial (215 F.Supp. 169)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CIVIL ACTION No. 2470

RICHARD SINCOCK ET AL., *Plaintiffs*,

v.

WILLIAM DUFFY, JR., ET AL., *Defendants*.

Before BIGGS, *Circuit Judge*, and WRIGHT, and LAYTON, *District Judges*.

OPINION

(Filed April 17, 1963)

By BIGGS, *Circuit Judge*.

This is a Three-Judge Court constituted pursuant to Section 2284 of Title 28, U.S.C., and our jurisdiction lies in the first instance in the provisions of Sections 2281 and 1343, Title 28, U.S.C., and in Section 1983, Title 42, U.S.C.A., the Civil Rights Acts. We are called upon to restrain enforcement of a provision of the Constitution of Delaware and for other relief as set out hereinafter. Section 2281 states in pertinent part: "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute made by an administrative board or commis-

sion acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." We, of course, in the case at bar are passing on provisions of the Constitution of Delaware, as hereinafter set out, and are not adjudicating the validity of a "statute". But, as the Supreme Court has stated, it would be incongruous to hold that a single judge "while prohibited from enjoining action under an act of the state legislature, would be free to act if the state constitution alone were involved." See American Federation of Labor v. Watson, 327 U.S. 582, 592-593 (1946).

Our jurisdiction over the subject matter of the instant case has been stated by us in one of our previous opinions as follows: "In Baker v. Carr, 369 U.S. 186 (1962), the Supreme Court of the United States held that a court such as this had the jurisdiction to and must determine whether or not the apportioning of members of a State general assembly by geographical units offends the constitutional rights of the electors of the State under the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States because of an alleged debasement of their voting rights." See 207 F.Supp. at p. 205.

The suit at bar is a class action brought by the plaintiffs on their own behalf and on behalf of all other persons similarly situated. Some of the prior history of this case is set out in our opinions in 207 F.Supp. 205, in 210 F.Supp. 395, and in *id.* 396 (*sub nom.* Sincock v. Terry). As will be gathered from the preceding paragraph, the fundamental issue presented for our adjudication is whether or not the apportioning of members of the General Assembly of the State of Delaware offends the electors of the State because of an alleged debasement of their voting rights. We have before us not only the provisions of Section 2 of Article II of the Constitution of Delaware of 1897 as originally framed, Del.C.Ann., but also the Amendment to Section 2

of Article II as agreed to by the 122nd General Assembly this year. See *id., supra,* (1962 Supp.) This is so because the new Section 2 of Article II, promulgated and effective in January 1963, is designated an "Amendment", and if it should fail for constitutional infirmities old Section 2 of Article II might conceivably be deemed to be reinstated. We shall not rule on this issue. Rather than deal with the intricacies of law relating to survival or revival of constitutional provisions, it seems simpler to adjudicate the constitutionality of both old and new Section 2 of Article II, and we shall do so.

The relief sought by the plaintiffs in substance is an adjudication that Section 2 of Article II as it was prior to the 1963 Amendment and as it is now is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States. The plaintiffs also seek a decree of this court reapportioning the representation of both the House of Representatives and the Senate of the General Assembly of Delaware in accordance with Section 3 of Article I of the Constitution of Delaware, and have submitted a plan on which an extensive hearing was had pursuant to the pretrial order. The plaintiffs assert that this plan would, if decreed by this court, grant them and other citizens of Delaware the relief sought. The plaintiffs also desire an injunction to restrain the defendants[1] from applying the apportionment provided

[1] When we use the term "defendants" we desire to point out as we did in one of our earlier opinions in this case, *sub nom.* Sincock v. Terry, 210 F.Supp. at p. 399, note 1 cited to the text, that the Chancellor of Delaware and the Judges of the Superior Court of the State of Delaware, all members of the Boards of Canvass, state in their answers that as judicial officers serving in ministerial capacities they deem it inappropriate to take a position on the merits of this lawsuit but aver that as Chancellor of Delaware or as Judges of the Superior Court they will continue to discharge the duties imposed upon them by the Constitution of the State of Delaware unless restrained by a lawful order of this Court. The Chancellor and the Judges have not, of course, asserted any position in respect to the matters dealt with in this opinion.

by the Constitution of Delaware, as it was and as it is, at the next general election or thereafter.

The case was pretried extensively. A statement of agreed facts is set out in the pretrial order. Affidavits have been filed and depositions taken. The court also has had the advantage of the evidence of three political scientists whom the court deemed to be well qualified in that field. The qualifications of these gentlemen are set out in the testimony and need not be repeated here. They were Dr. Paul Dolan of the University of Delaware and Associate Professor Royce Hanson of American University, who testified on behalf of the plaintiffs, and Dr. James R. Pollock, Murfin Professor of Political Science at the University of Michigan, who gave evidence on behalf of the defendants. We also have had the benefit of the testimony of Mr. Leon de Valinger, State Archivist of Delaware, who has specialized in the history of the government of this State, and of Houston Wilson, Esquire, a member of the Delaware Bar, Chairman of a Subcommittee of the Bi-Partisan Reapportionment Committee, the parent committee appointed by the Governor of Delaware and which made a report to him.

The findings of fact made herein are, of course, based on the entire record.

I

The plaintiffs are residents of four representative districts and four senatorial districts of the State of Delaware and are duly qualified voters and taxpayers of the State and citizens of the United States. The defendants comprise the Boards of Canvass, the Clerks of Peace, the Departments of Election and their Secretaries, of New Castle, Kent and Sussex Counties, respectively, and the State Election Commissioner, all of whom perform statutory and constitutional duties relating to the general elections in the State of Delaware.

The composition of the House and Senate of the General Assembly is established by the provisions of Section 2,

Article II of the Constitution of the State of Delaware of 1897. This section, as it existed prior to the 1963 Amendment, divided Delaware into 35 geographical representative districts and provided that the qualified electors of each district should elect one representative. It also divided Delaware into 17 geographical senatorial districts from each of which a Senator was chosen by the qualified electors thereof. The section created 15 representative districts, numbered one to 15 inclusive, in New Castle County; 10 representative districts, numbered one to ten inclusive, in Kent County; and 10 representative districts, numbered from one to ten inclusive, in Sussex County. It also established 7 senatorial districts, numbered 1 to 7 inclusive, in New Castle County; 5 senatorial districts, numbered 1 to 5 inclusive, in Kent County; and 5 senatorial districts, numbered 1 to 5 inclusive, in Sussex County.

The apportionment of Delaware into representative and senatorial districts as designated was the result of a Constitutional Convention convened at Dover, Delaware, on December 1, 1896, for the purpose of revising the Constitution of the State of Delaware of 1831.

At the time of the adoption of the Constitution of 1897 the popuiation of Delaware was approximately 180,000. About 105,000 persons resided in New Castle County, 70,000 of whom resided in the City of Wilmington,[2] and 35,000

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[2] The official title of the City of Wilmington is "The Mayor and Council of Wilmington". We point out that the City of Wilmington is located in New Castle County and also to those readers unfamiliar with Delaware mores that that portion of New Castle County outside the boundaries of the City of Wilmington is and was referred to customarily in the record, the briefs and oral arguments in this case and in this opinion, on occasion, as "*rural* New Castle County". (Emphasis added.) The term "rural" so used does not necessarily mean the countryside for there are other municipalities or their factual equivalents situated in New Castle County other than the City of Wilmington. "Rural New Castle County" as that word is interpreted in Delaware by Delawareans, means all that part of New Castle County which is not Wilmington.

resided in rural New Castle County. Kent County had a population of 32,000 and Sussex County a population of 38,000.[3]

At the time of the adoption of the Constitution of 1897 the inhabitants of rural New Castle County, Kent County, and Sussex County were considered to be identical insofar as their occupations and vocations were concerned and the populations of the respective counties were substantially equal. Accordingly each county was apportioned to the then existing population so that each rural area had 10 representatives in the House of Representatives and 5 senators in the Senate of the General Assembly. The City of Wilmington with a population of 70,000 was accorded special consideration and was allotted 5 representatives in the House of Representatives and 2 senators in the Senate.[4]

By April 1, 1930, according to the 15th Decennial Census[5] of the United States, the population of the State of Delaware had increased to 238,380 which represented an increase of 15,374 or 6.9% as compared with the population on January 1, 1920. In 1930 New Castle County had grown

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[3] See Population of Delaware, Table 1, Plaintiffs' Exhibit No. 3 to the Deposition of Doctor Paul Dolan. The reader will observe, if the bald figures set out in this paragraph are added up, there is a deficiency of about 5,000. If the official census figures be examined, however, and the Dolan Deposition be read, it will appear that the figure "180,000" represents an estimate between the figures of the 1890 Decennial Census and those of the 1900 Decennial Census.

[4] Vol. 3: Debates and Proceedings of the Constitutional Convention of the State of Delaware; pp. 2008-2112, 2029-2031.

[5] 15th Decennial Census of the United States: 1930, published by the United States Department of Commerce, Bureau of the Census. The term "Decennial Census" and the term "Census" are used from time to time throughout this opinion as in the pretrial order. The reference is always to a Decennial Census as published by the Department. Plaintiffs' Exhibit No. 4 to the Deposition of Doctor Dolan.

to 161,032 inhabitants of which 106,597 resided in the City of Wilmington and 54,435 resided in rural New Castle County, while Kent County had a population of 31,841 and Sussex County had a population of 45,507.[6]

By 1960 the total population of Delaware had increased to 446,292 of which 307,446 resided in New Castle County. Of these, 95,827 resided in the City of Wilmington and 211,619 resided in rural New Castle County. In the same year 65,651 persons resided in Kent County and 73,195 persons inhabited Sussex County.[7] It is apparent from the foregoing that New Castle County in general and rural New Castle County in particular have grown in population out of proportion to the growths in Kent and Sussex Counties. Using the 1897 and the 1960 figures as a basis the percentage-wise growth of the three Counties has been approximately as follows: In 1897 rural New Castle County had approximately 20% of the population, Kent County had approximately 18%, and Sussex County had approximately 21%. In 1960 rural New Castle County had approximately 47% of the population, Kent County had approximately 14%, and Sussex County had approximately 16%.

The apportionment of the 35 representative districts established by Section 2 of Article II of the Constitution of Delaware of 1897, as it existed prior to the 1963 Amendment, for the years 1890 through 1960, as was follows:

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[6] 15th Decennial Census of the United States at pp. 4-5. Note 4, *supra*.

[7] United States Census of Population, 1960, published by the United States Department of Commerce, Bureau of Census. Plaintiffs' Exhibit No. 2 of the Deposition of Doctor Dolan.

NEW CASTLE COUNTY

DISTRICT	1890	1900	1910	1920	1930	1940	1950	1960
Wilmington								
1					11,513	12,262	11,515	7,844
2					31,299	35,082	35,762	33,772
3					21,222	22,843	41,417	18,359
4					9,352	9,877	9,078	5,394
5					31,446	32,440	32,584	30,488
Total	61,431	76,508	87,411	110,168	106,597	112,504	110,356	95,827

NEW CASTLE COUNTY

DISTRICT	1890	1900	1910	1920	1930	1940	1950	1960
6	3,994	3,899	4,440	6,451	10,917	14,426	24,039	58,228
7	6,144	4,736	6,038	6,298	14,317	18,696	32,224	47,509
8	3,786	3,728	3,886	4,052	4,453	5,662	7,677	23,428
9	2,870	3,061	3,587	3,921	5,476	6,398	9,057	20,040
10	5,080	5,407	5,406	6,386	8,261	10,305	21,824	40,293
11	2,126	1,999	1,797	1,692	1,881	1,970	2,599	9,325
12	2,216	2,425	2,693	2,351	2,635	2,771	3,053	3,401
13	4,785	4,455	4,237	3,596	3,457	3,685	4,554	5,218
14	2,336	2,141	2,257	2,099	1,939	2,035	2,175	2,534
15	1,514	1,338	1,436	1,225	1,099	1,170	1,321	1,643
Total					54,435	67,058	108,523	211,619
Total NCC	97,182	109,697	123,188	148,239	161,032	179,562	218,879	307,446

KENT COUNTY

DISTRICT	1890	1900	1910	1920	1930	1940	1950	1960
1	4,372	4,228	3,627	3,521	3,229	3,506	4,422	6,084
2			3,046	2,623	3,133	3,530	4,248	17,806
3	2,885	3,144	3,032	2,831	2,586	2,527	2,671	3,361
4			2,709	2,439	2,292	2,502	2,555	3,716
5			3,771	3,927	4,363	5,169	6,052	9,125
6		1,242	2,941	2,509	2,352	2,274	2,168	2,626
7			3,252	3,229	3,393	3,745	3,838	7,880
8			3,331	3,000	3,040	3,200	3,269	5,168
9			3,945	3,920	4,043	4,288	4,418	4,956
10	3,364	3,118	3,067	3,033	3,410	3,700	4,229	4,929
Total:			32,721	31,023	31,841	34,441	37,870	65,651

USSEX COUNTY

ISTRICT	1890	1900	1910	1920	1930	1940	1950	1960
	3,913	4,117	5,069	5,079	5,276	5,936	7,254	9,641
	2,793	3,456	5,329	4,589	4,329	5,315	5,849	6,439
	3,223	3,779	5,174	5,346	5,182	6,350	7,815	9,437
	3,074	3,132	3,352	2,761	2,955	3,448	4,446	5,318
	4,511	5,112	5,980	6,362	6,319	6,804	7,139	8,140
	3,495	3,575	4,979	4,513	4,836	5,779	6,470	8,010
			4,770	4,016	4,755	5,415	6,195	6,623
			1,884	1,821	1,803	1,864	2,536	2,957
	2,436	2,874	3,028	3,071	3,062	3,456	3,563	4,271
	2,997	3,959	6,857	6,183	6,990	8,135	10,069	12,359
otal:			46,413	43,741	45,507	52,302	61,336	73,195[8]

As a result of the change in population the representative districts range in size from 1,643 inhabitants of New Castle County's 15th Representative District of Blackbird Hundred[9] to 58,228 inhabitants of New Castle County's 6th Representative District of Brandywine Hundred. At the time of the 1962 general election a vote in the 15th Representative District was equal to one vote in the 6th Representative District of New Castle County, although the population of the latter district is approximately 35 times greater than that of the former.

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[8] Table 5 Population of States and Territories by Minor Civil Divisions; 1890 and 1900, Delaware (Form 12 Census of the United States, Population, Volume 1); 15th Census of the United States: 1930, Population Bulletin, First series Delaware, Number and Distribution of Inhabitants; 1960 Census of Population, Number of Inhabitants, Delaware, Final Report P.C. (1)—9A—Plaintiffs' Exhibits 2, 3, 4, 5, 10, 11 and 12 of the Dolan Deposition.

[9] "Hundred" is used in Delaware in the same sense, we believe, as it was originally employed in English law to signify "A division of a county, which some make to have originally consisted of 100 hides of land, others of 10 tithings or 100 free families." Bouvier's Law Dictionary, Rawle's 3rd Rev. Bouvier also states, "In Delaware the subdivisions of a county are called hundreds. They correspond to towns in New England, townships in Pennsylvania, parishes in Louisiana, and the like." See also Webster's Collegiate Dictionary.

We take judicial notice of the fact that in the State of Delaware, as in the other States of the United States, there is a direct and reliable relationship between the number of inhabitants in a given area and the number of electors therein and that the ratio of electors to inhabitants is relatively stable. We find, therefore, that the number of inhabitants of a given area in the State of Delaware reflects with relative accuracy the number of electors in that area, and for the purpose of adjudicating the issues in this case that it is the fact that the number of inhabitants is a relatively accurate indicator of the number of electors entitled to be represented in the General Assembly from the area given if representation is to be measured on a population-area basis. No party to this case takes a view in respect to this matter different from that which we have just expressed.

We point out that 18 representative districts with the least population and containing only approximately 18½% of the State's population may elect a majority of the members of the House of Representatives. The inhabitants of the 18 least populated representative districts are less in number than those of the two districts having the heaviest concentration of population; nonetheless, the former elect 18 representatives in the House of Representatives, while the latter elect 2 representatives in the House of Representatives of the Delaware General Assembly. The 1960 Census shows that more than one-half of the entire population of the State of Delaware, 233,718 persons, lives in six representative districts, yet the representatives of those districts have the same voting power in the General Assembly as the representatives of but 16,552 persons residing in the 6 least populous representative districts of the State of Delaware.

A similar situation existed prior to the 1963 Amendment with regard to the senatorial districts established by the Constitution of 1897 where 7 senators were apportioned to New Castle County which had a population in 1960 of

307,446 as compared with 5 senators in Kent County having a population of 65,651, and with 5 senators in Sussex County with a population of 73,195. Of the 7 senators from New Castle County, 5 represent the rural area, having a population of 211,619. The City of Wilmington with a population of 95,827 was allotted 2 senators in the General Assembly as contrasted with 5 senators each for Kent and Sussex Counties and rural New Castle County.

The 17 senatorial districts established by Section 2, Article II of the Constitution of the State of Delaware of 1897, as it existed prior to the 1963 Amendment, varied greatly in the number of inhabitants residing in them. The population of these districts from 1930 through 1960, with the percentage of change in each, was as follows:

		POPULATION				% CHANGE		
COUNTY	Dist.	1930	1940	1950	1960	1940/ 1930	1950/ 1940	1960/ 1950
New Castle	1	52,521	57,925	57,089	52,131	+10	—1	—9
	2	54,076	54,579	53,177	43,696	+ 1	—3	—18
	3	12,778	16,856	28,228	64,345	+32	+67	+128
	4	16,909	21,928	35,712	64,820	+30	+63	+81
	5	16,372	19,414	33,934	63,734	+19	+75	+88
	6	5,338	5,655	7,153	14,543	+ 6	+26	+103
	7	3,038	3,205	3,496	4,177	+ 5	+ 9	+19
Kent	1	6,362	7,036	8,670	23,890	+11	+23	+176
	2	4,878	5,029	5,226	7,077	+ 3	+ 4	+35
	3	7,756	8,914	9,890	17,005	+15	+11	+72
	4	6,395	6,562	6,586	7,582	+ 3	—	+15
	5	6,450	6,900	7,498	10,097	+ 7	+ 9	+35
Sussex	1	9,605	11,251	13,103	16,080	+17	+16	+23
	2	8,137	9,798	12,261	14,755	+20	+25	+20
	3	11,155	12,583	13,609	16,150	+13	+ 8	+19
	4	6,558	7,279	8,731	9,580	+11	+20	+10
	5	10,052	11,591	13,632	16,630	+15	+18	+22[10]

The 17 senatorial districts, as established by Section 2, Article II of the Constitution of 1897 prior to the 1963 Amendment, varied in 1960 from approximately 65,000 to approximately 3,000 inhabitants. The vote in the General

[10] Liberman and Rosbrow, "The Delaware Citizen," Welfare Council, "Population of Minor Civil Divisions (Representative Districts) in the Counties of Delaware, 1950 and 1960."

Assembly of the smallest senatorial district was equal to that of the largest senatorial district which exceeded it in numbers of population by more than 21 times. The apportionment established by the Constitution with respect to the Senate permitted 22% of the voters of the State of Delaware to elect a controlling majority in the Delaware Senate.

The uneven growth of the different areas of the State created a condition because of which the numbers of inhabitants in representative and senatorial districts differed not only on an intercounty basis but also on an intra county basis. Differences also manifested themselves in the representative districts within the City of Wilmington. For example the 4th Representative District of Wilmington, having 5,394 inhabitants, had the same representation in the House of Representatives of Delaware as the 2nd Representative District with 33,772 inhabitants and the 5th Representative District with 30,488 inhabitants.

The Amendment of Section 2 of Article II is now in effect and will remain so unless it be declared unconstitutional. Its provisions will govern the next general election in the State of Delaware. The Amendment provides in pertinent part:

> "Section 1. Paragraphs 1 and 2 of Section 2 of Article II of the Constitution are hereby amended to read:
>
> "The House of Representatives shall be composed of thirty-five members, plus such additional members as shall be provided pursuant to Section 2A of this Article, who shall be chosen for two years. The Senate shall be composed of twenty-one members, who shall be chosen for four years.
>
> "The State is hereby divided into thirty-five Representative Districts. There shall be such additional Representative Districts as shall be provided

pursuant to Section 2A of this Article. From each Representative District there shall be chosen, by the qualified electors thereof, one Representative. The State is also hereby divided into twenty-one Senatorial Districts, from each of which shall be chosen, by the qualified electors thereof, one Senator. In New Castle County there shall be seven Senatorial Districts, numbered from one to seven inclusive; in Kent County, seven Senatorial Districts, numbered from one to seven inclusive; and in Sussex County, seven Senatorial Districts from one to seven inclusive.

"Section 2. The following words are hereby added after the words: 'Number Five. The Eighth and Tenth Representative Districts', in that part of Article II, Section 2 of the Constitution dealing with the Senatorial Districts in Kent County:

"Number Six, at Large. The first, second, fifth, seventh and eighth Representative Districts.

"Number Seven, at Large. The third, fourth, sixth, ninth and tenth Representative Districts.

"Section 3. The following words are added following the words 'Number Five. The Ninth and Tenth Representative Districts', in that part of Article II, Section 2 of the Constitution dealing with the Senatorial Districts in Sussex County:

"Number Six, at Large. The first, second, third, four and fifth Representative Districts.

"Number Seven, at Large. The sixth, seventh, eighth, ninth and tenth Representative Districts.

"Section 4. The following words are added immediately following the words added by Section 3 above:

"The first Senators elected from the Sixth Senatorial Districts of Kent and Sussex Counties shall

serve for a two year term only, thereafter their successors shall serve for a full four year term.

"Section 5. The following new Section 2A is added to Article II of the Constitution, immediately following Section 2:

"Section 2A. In addition to the existing 35 Representative Districts as set forth in Section 2 of this Article, there shall be additional Representative Districts as hereafter provided.

"Each existing Representative District as set forth in Section 2 of this Article, with a population residing therein in excess of 15,000, as shown by the last official federal decennial census shall be entitled to one additional Representative for each additional 15,000 population or major fraction thereof residing within the District.

"Upon any Representative District, as set forth in Section 2 of this Article, being entitled to more than one Representative, it shall be sub-divided into new Representative Districts for each additional Representative to which it is entitled, from which shall be chosen by the qualified electors thereof, a Representative.

"After each official federal decennial census the new Representative Districts created pursuant to this Section shall be abolished and the Representative Districts set forth in Section 2 of this Article shall again be re-divided as set forth herein.

"The sub-dividing of the Representative Districts as set forth herein shall be done by a Redistricting Commission, consisting of the Governor, as Chairman, and the State Chairman of the two political parties receiving the largest vote for Governor at the preceding election for Governor as advisors to the Governor. Redistricting and reapportioning by

the Commission as set forth herein shall be accomplished in accordance with the following criteria: Each new Representative District shall, insofar as is possible, be formed of contiguous territory; shall be as nearly equal in population as possible to the other new districts being created within the existing Representative District; shall be bounded by ancient boundaries, major roads, streams, or other natural boundaries; and not be so created as to unduly favor any person or political party.

"Within 120 calendar days following the official reporting to the President of the United States of each decennial census, (or within 120 calendar days after this amendment takes effect) the Governor, on behalf of the Commission, shall file with the Secretary of State the plan for redistricting and reapportioning as provided for herein. Forthwith, after the filing, the Governor shall issue a proclamation of redistricting and reapportioning. The Secretary of State shall cause such proclamation to be published in two newspapers of general circulation within the State for two consecutive weeks, within 20 days after the issuance of the proclamation. The proclamation shall become effective within 30 days of its issuance.

"Any qualified voter may apply to the Superior Court to compel the Governor, by mandamus or otherwise, to perform the redistricting and reapportioning duties or to correct any error in redistricting and reapportioning. Application to compel the Governor to perform the redistricting and reapportioning duties must be filed within thirty days of the expiration of the 120 days allotted to the Commission to file its plan, if such plan is not timely filed. Application to compel correction of any error in redistricting and reapportioning must be filed within

thirty days following the proclamation. Original jurisdiction in these matters is hereby vested in the Superior Court. On appeal, the cause shall be reviewed by the Supreme Court upon the law and the facts.

"Section 6. The following new Section 2B is added to Article II of the Constitution, immediately following Section 2A as enacted above.

"Section 2B. The number of delegates and the method of electing delegates to the Constitutional Convention as provided in Section 2, Article 16, shall not be effected by the addition of Representatives or Representative Districts, pursuant to Section 2A of this Article. The Representative Districts which shall elect delegates to the Constitutional Convention are as set forth in Section 2 of this Article."

The only effect of the Amendment on the apportionment of the Senate is to create two additional senatorial districts in Kent and Sussex Counties increasing the total number of senatorial districts throughout the state from 17 to 21, which would give 7 senators to each of the 3 Counties. The Amendment's effect on the House of Representatives is to create 20 additional representative districts by dividing the existing more populous districts and by providing for additional representation for each increment of 15,000 population residing therein, or any major fraction thereof.

The Amendment results in a House of Representatives composed as follows insofar as New Castle County is concerned:

District	Population		Effect of Amendment	Average Population Per Representative
1	7,814)		Unchanged	7,814
2	33,772)	City	Add 1 Representative	16,886
3	18,359)	of	Unchanged	18,359
4	5,394)	Wilming-	Unchanged	5,394
5	30,448)	ton	Add 1 Representative	15,244
6	58,228		Add 3 Representatives	14,557
7	47,509		Add 2 Representatives	15,836
8	23,428		Add 1 Representative	11,714
9	20,040		Unchanged	20,040
10	40,293		Add 2 Representatives	13,431
11	9,325		Unchanged	9,325
12	3,401		Unchanged	3,401
13	5,218		Unchanged	5,218
13	5,218		Unchanged	5,218
14	2,534		Unchanged	2,534
15	1,643		Unchanged	1,643

The effect of the 1963 Amendment on the election of representatives to the House of Representatives from Kent and Sussex Counties is nil.

Pursuant to the apportionment of the 1963 Amendment, the representative districts of Delaware and the respective ratios of their population and consequent disparities to that of the 15th Representative District, the smallest, is as follows:

New Castle County Districts	Population	Ratio to 15th Representative District of New Castle County
1	7,814	4-1
2A	16,886	10-1
2B	16,886	10-1
3	18,359	11-1
4	5,394	3-1
5A	15,244	9-1
5B	15,244	9-1
6A	14,557	8-1
6B	14,557	8-1
6C	14,557	8-1
6D	14,557	8-1
7A	15,836	9-1
7B	15,836	9-1
7C	15,836	9-1
8A	11,714	7-1
8B	11,714	7-1
9	20,040	12-1
10A	13,431	8-1
10B	13,431	8-1
10C	13,431	8-1
11	9,325	5-1
12	3,401	2-1
13	5,218	3-1
14	2,534	1½-1
15	1,643	

Kent County Districts	Population	Ratio
1	6,084	3½-1
2	17,806	10½-1
3	3,361	2-1
4	3,716	2-1
5	9,125	5½-1
6	2,626	1½-1
7	7,880	4½-1
8	5,168	3-1
9	4,956	3-1
10	4,929	3-1

Sussex County Districts	Population	Ratio
1	9,641	5½-1
2	6,439	4-1
3	9,437	5½-1
4	5,318	3-1
5	8,140	5-1
6	8,010	4½-1
7	6,623	4-1
8	2,957	1½-1
9	4,271	2½-1
10	12,359	11½-1

The disparity in population per representative district in New Castle County is over 12 to 1. Disparities of over 3 to 1 exist within the City of Wilmington and over 7 to 1 in Kent County and 4 to 1 in Sussex County. Furthermore, in almost all cases, disparities are to be found in districts that adjoin one another. The long range effect of the Amendment is to guarantee disparities in the population of the representative districts. The Amendment increases the number of representatives from New Castle County so that approximately 55% of the representatives are allocated to it. The Amendment will, however, permit but 28% of the population of the State to elect a majority of the members of the House of Representatives. This 28% of the population lives in the 23 smallest districts.

The Amendment results in a Senate composed as follows:

District, New Castle County			Effect of Amendment	Average Population per Senatorial District
1	52,131		Unchanged	
2	43,696		Unchanged	
3	64,345		Unchanged	
4	64,820		Unchanged	43,921
5	63,734		Unchanged	
6	14,543		Unchanged	
7	4,177		Unchanged	
Total	307,446			
District, Kent County				
1	23,890		Unchanged	
2	7,077		Unchanged	
3	17,005		Unchanged	
4	7,582		Unchanged	9,378
5	10,097		Unchanged	
6		46,063		
7		19,584		
Total	65,651			
District, Sussex County				
1	16,080		Unchanged	
2	14,755		Unchanged	
3	16,150		Unchanged	
4	9,580		Unchanged	10,456
5	16,630		Unchanged	
6		38,975		
7		34,220		
Total	73,195			

Under the Amendment the population disparities in New Castle County in the 7 senatorial districts would range from 4,177 in the 7th Senatorial District to 64,820 inhabitants in the 4th Senatorial District, or a ratio of more than 15 to 1. In Kent County the population disparities between districts range from 7,077 inhabitants in the 2nd Senatorial District to 46,063 in the 6th Senatorial District, or a ratio of approximately 6½ to 1, and in Sussex County the population disparities between districts range from 9,580 in the 4th Senatorial District to 38,000 in the 6th Senatorial District, or a ratio of more than 4½ to 1. The average population for each senatorial district in the three Counties ranges from 43,921 in New Castle County for each senator elected to 9,378 in Kent County, or a ratio of more than 4½ to 1 between the counties.

The election of 7 senators in each county irrespective of population creates a situation whereby Kent County with about 14½% of the total population of Delaware will elect ⅓ of the Senate, and Sussex County with about 16½% of the total State population will elect ⅓ of the Senate. New Castle County with about 69% of the total State population will elect ⅓ of the Senate.

The Amendment adds two at-large senatorial districts in both Kent and Sussex Counties superimposed on existing senatorial districts. By reason of this, each resident[11] of New Castle County is entitled to vote for and elect 1 senator in the General Assembly of Delaware while each inhabitant of Kent and Sussex Counties will elect 2 senators to represent him in the General Assembly.

The Amendment gives little or no consideration to population with regard to the apportionment of representation in the Senate.

The Amendment also provides that in the event a Constitutional Convention be called, as provided in Section 2, Article XVI of the Constitution of 1897, the number of delegates and the method of electing them shall not be affected by the addition of representatives or representative districts created by the Amendment and that for the purpose of any future Constitutional Convention, the representative districts shall elect delegates to the Convention on the basis of apportionment provided by Section 2 of Article II as it existed prior to the 1963 Amendment.[12]

We find further that in the decade 1952 through 1961 the State Tax Commission has collected a total of $239,000,000, of which $166,900,000 represented personal

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[11] The term "resident" is used in the statement of facts stipulated in this part of the pretrial order.

[12] The provisions of Section 2B have been quoted at an earlier point in this opinion.

income taxes, $23,500,000 represented inheritance and estate taxes, $10,800,000 represented license fees and $16,190,000 represented cigarette and cigar tax collections.[13] The State Tax Commission Reports indicate that in excess of 92% of the total taxes have been collected in New Castle County in that period, that 3% were collected in Kent County and 5% were collected in Sussex County. Of the $166,900,000 collected for personal income taxes, approximately 92% were collected in New Castle County, 3% in Kent County and 5% in Sussex County. Of the $23,500,000 collected for inheritance and estate taxes, approximately 94% were collected in New Castle County, 2% in Kent County and 4% in Sussex County. Of the $10,800,000 collected for licenses, approximately 70% were collected in New Castle County, 12% in Kent County and 18% in Sussex County. Of the $16,190,000 collected by the Commission for cigarette and cigar taxes in the decade, approximately 74.3% were collected in New Castle County, 12.4% were collected in Kent County and 13.3% were collected in Sussex County.

Collections made by the State Tax Commission in the same decade, broken down to illustrate the amount of taxes collected in each of the three Counties in accordance with their respective Representatives in the General Assmbly, show that, excluding franchise and corporation taxes, the amounts collected averaged approximately $13,000,000 per representative in New Castle County, less than $1,000,000 for each representative elected in Kent County, and approximately $1,000,000 for each representative in Sussex County. In the same period New Castle County collected approximately $10,500,000 in personal income taxes for each representative, while Kent County collected less than $500,000 for each representative, and Sussex County col-

[13] Plaintiffs' Exhibit No. 4.

lected approximately $800,000 per representative.[14] [15] The effect of the Amendment is to give to Kent and Sussex Counties with 31% of the total State population the ability to control measures requiring a two-thirds vote in the Senate, including revenue measures and appointments by the Governor. The combined voting strength of Kent and Sussex Counties in the Senate will be able to override the executive veto.[16]

Representation strictly according to population is a comparatively new historical concept. In many bodies somewhat similar to state legislatures, there is representation according to factors other than population; for example, the Congress of the United States, the General Assembly of the United Nations, and the House of Lords in England. One of the traditional concepts of state government in the United States is political area representation. Political area representation is based as a means of apportioning representation in legislative groups on an international and national basis, as state basis and a city basis. Most of the States have representation in one of their houses, usually the senate, or a county or political area basis. The formation of representative districts in state government is normally the function of the legislative branch. The prevailing theory of government in the United States is a bicameral system. As to the unicameral system,

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[14] See plaintiffs' Exhibit No. 3.

[15] In the six-year period prior to the filing of the suit at bar, the General Assembly received approximately seven bills having as their object the reapportionment of Delaware either by a constitutional convention or by a constitutional amendment. Prior to the inception of the suit at bar each of these bills, with the exception of one which was introduced by Senator Elwood M. Melson, failed to emerge from committee. The Melson bill providing for reapportionmnet was voted out of the Senate Committee but was defeated.

[16] See Section 18, Article III, Constitution of 1897 as amended. Del. C.Ann. (1962 Supp.).

that of Nebraska was adopted in 1937 and although there have been attempts in approximately 50% of the states since 1937 to set up similar systems no other state has done so.

The area basis of representation has emerged as a political concept in Delaware. What is now the State of Delaware results from an emergence of the so-called "Three Lower Counties-on-the Delaware" of William Penn's Colony. The three lower counties had an organization separate and apart from any other colony and were created by a fission from the mother Colony. A more detailed explanation is necessary. There was a legislature which met in the three lower counties and passed legislation for them which could be approved or disapproved by the representative of the governor of Pennsylvania. In 1704, the three lower counties separated completely from the Province of Pennsylvania except for the office of Governor General. The people who resided in the three counties joined together in 1776 and created an organization completely independent of the colony and the Commonwealth of Pennsylvania. Delaware existed as a State prior to the creation of the United States. For at least one hundred years prior to 1776 the three Counties had been in existence. From time to time there was a Colonial Assembly and later a state assembly or legislative body for the three lower Counties on the Delaware River in which there was equal representation from each one of the three Counties. That system continued to exist until the adoption of the Constitution of 1897, having been embodied in the Constitution of 1776, the Constitution of 1792 and the Constitution of 1831.

In 1896 the population of each of the three Counties, excluding Wilmington, was approximately equal. The Constitution of 1897 varied the pattern of equal representation from the three Counties by adding five representatives for New Castle County and two for the City of Wilmington.

The basis for this addition is not clear from the constitutional debates.

Pursuant to state statutes, the counties, *qua* county, exercise the following legislative functions or rights: (a) to assess and levy, collect and receive taxes, 9 Del.C.Ann. § 8601, et seq; (b) to appropriate and borrow money, 9 Del.C.Ann.§§ 4111, 4131, 4133, 1522, 1561, 1563, 6111, 6131, 6132, 6205; (c) to establish pension plans for employees, 9 Del.C.Ann. §1701, et seq; (d) to appropriate money for the indigent sick, 9 Del.C.Ann. §§ 1801, 4201, 6205; (e) to appropriate money for welfare purposes, 9 Del.C.Ann. § 1521 and 31 Del.C.Ann. §§ 329 and 513; (f) in New Castle County to designate firemen and policemen, 9 Del.C.Ann. § 1903; (g) to provide an ambulance and rescue service, 9 Del.C.Ann. §2001; (h) to supervise street and highway lighting if the taxable people within the area petition it, in which event the Levy Court acts as a holding company to make the proper contract, 9 Del.C.Ann. § 2101; (i) general supervision over sidewalks, fire hydrants, water mains, sanitary and drainage sewers, when fifty per cent or more of the taxable people in a certain area petition that this be done, 9 Del.C.Ann. § 503; (j) to control garbage and refuse collection and disposal thereof, 9 Del.C.Ann. § 2401; (k) as to New Castle County, jurisdiction with respect to planning and zoning, 9 Del.C.Ann. § 2601; (l) certain jurisdictional authority with respect to parks and recreation, 9 Del.C.Ann. §§ 610 and 616; and (m) the Register of Wills, Prothonotary, Sheriff, Coroner and Recorder of Deeds carry out the general state laws under the respective county governments, 9 Del.C.Ann. § 9101 et seq., § 9502 et seq., § 9603 et seq.

In colonial days the Levy Courts had the power to administer alms houses, and were until 1935 overseers of roads. They also had the power to tax but did not make the general laws.

II

We point out that the rights asserted by the plaintiffs are personal rights, indeed that they may be described as "personal civil rights", and that they are of great importance. Mr. Justice Brennan stated that one of the jurisdictional questions presented by Baker v. Carr was whether or not the plaintiffs had "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for the illumination of difficult Constitutional questions . . ." He went on to say: "This is the gist of the question of standing. It is, of course, a question of federal law." See 369 U.S. at p. 204.

The answer given by the Supreme Court to its own question in the cited case, as we know, was that the plaintiffs had standing to maintain the suit if their franchises had been subject to invidious discrimination and if they had a personal stake in the outcome of the controversy. Baker v. Carr, *supra*, pp. 204-208. So is it here. We find, as we have stated in earlier opinions, that the plaintiffs can maintain the instant suit, that the cause of action is cognizable under federal law, and that we have jurisdiction of the subject matter and of the parties.

What we have found under the previous heading of this opinion demonstrates that Section 2 of Article II of the Constitution of Delaware as it existed prior to the 1963 Amendment, and as it exists today creates such an inequality in voting power, resulting in invidious discrimination, as to bring it within the proscripton of the Fourteenth Amendment of the Constitution of the United States. Baker v. Carr, *supra*; Sincock v. Terry, *supra*, 207 Fed. Supp. 205. This is true as to the apportionment of the Senate as well as to the apportionment of the House of Representatives of the General Assembly of Delaware. While mathematical exactitude in apportionment cannot be ex-

pected, and indeed is not possible in an absolute sense, disparities created by Section 2 of Article II, as it was prior to the 1963 Amendment and as it is now, are of such a startling nature as to demonstrate a debasement of franchise of individual electors of this State which the Equal Protection Clause of the Federal Constitution cannot tolerate.

In respect to the apportionment of the House of Representatives of the General Assembly under Section 2 of Article II as it existed prior to the 1963 Amendment finding one disparity approximately as large as 35 to 1 in one instance and very gross in many others, the representatives of the six least populous representative districts containing only 16,552 inhabitants having equal voting power with the six most populous representative districts, containing 233,718 persons, and the vagaries existing in representative districts even contiguous to each other, both in rural areas and in the City of Wilmington and the other facts as we have found them under heading "I", we state that we can find no rational basis for the apportionment. In respect to the apportionment of the House of Representatives under the 1963 Amendment which reflects one disparity as high as 12 to 1, several at 11 to 1, 10 to 1 and 9 to 1, many at 8 to 1, the lowest at 1½ to 1, and the vagaries existing in representative districts even contiguous to each other both in rural areas and in the City of Wilmington, for example, 28% of the population of Delaware able to elect a majority in the House of Representatives, and the other facts as we have found them, we state that we can find no rational basis for the apportionment. An examination of the record will show that not one of the experts on political science, including Doctor Pollock called by the defendants, suggested that a House of Representatives apportioned on considerations other than those reflecting population to geographical areas with reasonable exactitude could find support in reason. Putting the matter plainly the apportionment of Section 2 of Article II, new

or old, is capricious, arbitrary, and invidiously discriminatory when viewed in the year 1963. In apportioning the House of Representatives the basis must be one of population. "One vote, One person" must be the aim. Gray v. Sanders, —— U.S. —— (1963).

As to the invalidity of the apportionment of the Senate there are certain arguments which we must discuss. The defendants assert that a number of factors affect the apportionment of the Senate of the General Assembly of Delaware which must be taken into consideration, no matter how one may view the apportionment of the House of Representatives, and that Section 2 of Article II of the 1897 Constitution, when it was framed and promulgated, represented a realistic and valid apportionment of the Senate; but their position as to the validity of apportionment under that Constitution in the light of the statistical picture afforded by the 1960 Census is at best somewhat nebulous. We do not understand them to actually assert that the apportionment provided for by Section 2 of Article II, as it was prior to the 1963 Amendment is valid today, as meeting the guarantee of the Equal Protection Clause of the Fourteenth Amendment, but on the other hand some of them at least have not abandoned such a contention completely. To put the matter briefly, we believe that such a contention, if it be made, is not sound. Employing the 1960 Census we have seen that 7 senators were apportioned to New Castle County having a population of approximately 307,000, as compared with 5 senators in Kent County having a population of approximately 65,000, and Sussex County having a population of approximately 73,000 with 5 senators. The City of Wilmington, with a population of approximately 95,000, as contrasted with Kent and Sussex Counties having populations as stated, possessed but 2 senators as contrasted with 5 for each of the two lower counties. Assuming that factors such as history, economic conditions, diverse interests, county governmental functions, geography and other considerations

dealt with more specifically hereinafter, which have been designated by the Professors of Political Science and in particular by Doctor Pollock as "Area" factors, are completely applicable here, nonetheless they are insufficient to afford any substantial basis of support for the very gross population disparities demonstrated by this record. In short, the apportionment of old Section 2 of Article II in the light of the 1960 Census must be held to be irrational, arbitrary, and invidiously discriminatory.

As to the apportionment of the Senate under the 1963 Amendment, the population disparities in New Castle County in the seven senatorial districts range from approximately 4,000 persons in the 7th Senatorial District to approximately 64,000 in the 4th Senatorial District, a ratio, as we have seen, of more than 15 to 1 for each senator elected. In Kent County the apportionment created by the Amendment is equally arbitrary for the population disparities range from about 7,000 inhabitants in the 2nd Senatorial District to approximately 46,000 persons in the 6th Senatorial District, or a ratio of approximately 6½ to 1 for each senator elected. Viewed overall, the range in each senatorial district in the three Counties is from approximately 44,000 inhabitants in New Castle County for each senator elected to approximately 9,000 persons in Kent County or a ratio of more than 4½ to 1. It is also apparent, as we have already stated, that New Castle County with 69% of the State's population, will elect ⅓ of the Senate, whereas the two lower Counties with approximately 31% of the total population will elect ⅔ of the Senate.

The defendants contend that the Federal principle can be rationally employed at least for the apportionment of the Delaware Senate on a county basis as if the respective Counties possessed some degree of sovereignty. This contention is perhaps the one most relied on by the defendants. We therefore consider it first. The Federal principle is

based upon the Connecticut Compromise and the origin and nature of the Compromise can be stated briefly as follows. In the 1787 Convention, which framed the Constitution of the United States, the larger States supported thes so-called Virginia plan to create a bicameral legislature in which the rights of suffrage ought to be proportioned to the quotas of contributions or to the number of free inhabitants of the respective States.. The more populous States, since they thought that they would have to bear a greater burden taxwise and in other respects, sought a proportionally larger share of control of the central government, and the smaller States, such as Delaware, understandably did not desire to be controlled by their larger sisters. The Constitutional Convention was deadlocked when Roger Sherman of Connecticut proposed as a compromise one of the great political inventions of all time.[17] The problem was one of balance of power in a federation of States differing greatly in size, wealth and population. Sherman suggested that there should be two Houses, one with equal and the other with proportional representation. This was not quite acceptable to either the large state group or the small state group but the Sherman proposal was amended to link direct taxation and representation in the House of Respresentatives and these amendments were adopted and the Sherman proposal, so amended, was approved. It is generally believed by historians to be a fact that without the adoption of the Connecticut Compromise, the Federal principle, our Constitution could not or at least would not have been created when it was. But the fact that the Compromise in effect created Section 3 of Article I of the Constitution of the United States does not make the Federal principle, or as we would prefer to call it, under the circumstances of the

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[17] An English wit, whose name escapes us, has remarked that the Connecticut Compromise was the only great political invention since the queue.

instant case, the "County principle", logically applicable for the purposes of the Fourteenth Amendment in apportioning a state general assembly.

We find it difficult to relate the Federal principle in any very significant way to the defendants' contentions supporting the apportionment of the Senate of the General Assembly of Delaware under Section 2 of Article II, either old or new. The creation and application of the Federal principle were forced by the sovereignties of the 13 original Colonies or States and there never was much and there is now no sovereignty in the Counties of Delaware, though like counties of almost every State, our Counties possess and exercise some local governmental functions. The governmental functions of the three Counties of Delaware have decreased steadily since 1787[18] and have declined notably even within the memories of the members of this court. For example, we take judicial notice of the diminution of powers of the respective Levy Courts of the three Counties, the creation of the State Highway Department to service the effective system of roads which has pulled the State together and made the inhabitants of the three Counties easily and quickly accessible to one another, the rise of central educational governance, and the creation of State taxing agencies. To create a Senate on a purely county sovereignty principle, under the circumstances at bar, would seem to be quite unrealistic insofar as history and the Federal principle are concerned. But there have always been three Counties in Delaware and the culture and mores of our people to some degree have been formed upon these county units. Under these circumstances history must be deemed to deserve a little more courtesy than a mere distant bow, albeit no submissive genuflexion.

The geographical differences between the upper and lower parts of Delaware asserted by the defendants as a

[18] It will be borne in mind that Delaware, the first State to ratify the Constitution of the United States, did so on December 7, 1787.

rational distinction for apportionment need not concern us long. It is true that the upper part of the State and some of the upper Hundreds of New Castle County, for example, Mill Creek Hundred and Christiana Hundred, are slightly hilly and that the southern part of New Castle County and Kent and Sussex Counties are flat, but there is no geographical feature which prevents the residents of any County from easy access to those of another, or which obstructs face-to-face communication between the citizens and members of the General Assembly. Lack of accessibilty was the point made by Doctor Pollock in respect to the upper Michigan Peninsula where additional representation was felt to be required. Indeed, Doctor Pollock, on cross-examination, made it clear that in respect to geographical features only extraordinary ones like the inaccessibility of the uppper Michigan Peninsula to the rest of that State could justify the election of additional representatives to the lower House of a legislature and the consequent dislocation of the principle of strict representation of population therein. Doctor Pollock made it clear that he did not know whether Delaware possessed any potent "Area" factor or not. The plaintiffs' experts stated that in their opinion there was no such substantial geographical "Area" factor.

We have discussed the apportionment of the Senate on what may perhaps be aptly termed a "County Basis" but we desire to make it clear that there must be no invidious discrimination in apportioning senatorial districts vis-a-vis each other *within* the three respective Counties of Delaware. That such discriminations existed under old Section 2 of Article II and exist under the 1963 Amendment is made apparent by the last table set out in this opinion. Some of these discriminations are discussed specifically in the first paragraph following the table. "One vote, One person" must be the aim here as in apportioning the House of Representatives on a *State-wide* basis. While this might result oddly in some instances, for example in

senatorial districts respectively bordering on the New Castle County-Kent County boundary line, contiguous to each other, where a vote of an inhabitant of Kent County might be worth more than the vote of an inhabitant of New Castle County, such a result is not compulsory if adequate allocations of senatorial seats per county were made.

In apportioning the Senate we think that economic factors must be treated as "Area" factors. Large parts of the three Counties of Delaware are devoted to agriculture. There is a good industrial development in the State. While a somewhat larger percentage of this lies in New Castle County, Kent and Sussex Counties are developing industrially very rapidly. Wilmington is of course the metropolis of Delaware with some density of population, but what is legally the City of Wilmington is surrounded by suburban and semi-suburban areas interspersed rather chaotically with industrial development and suburban and semi-suburban areas. The City of Dover, the Capital of Delaware, and the larger cities in Sussex County, such as Seaford, are similarly expanding industrially. Wilmington does possess a good large port but port facilities for large industrial interests presently exist down the Delaware River on the Delaware side well south of Wilmington, while Lewes, in Sussex County, possesses the potentiality of a great port. Industry is moving steadily down the State as part of a tremendous development that within the lifetime of many who may read this opinion will result in an industrial area stretching from the New York City-Newark-Hoboken-Jersey City locale through the Delaware Valley in New Jersey and Pennsylvania to a point well below the National Capital. Although population density, extent of agricultural and industrial development and expanding city and suburban and semi-suburban areas are deemed to be cogent factors in considering apportionment, no very persuasive factor justifying any very special treatment in the apportionment of the Senate of the General

Assembly can fairly be said to lie in any purely geographical factor.

But other factors remain to be considered. Custom is a powerful force in any community whether it be large or small. The Constitution of the United States, with its bicameral Houses in which political recognition is afforded to the smaller Sovereignties such as Delaware and Rhode Island, has exercised a most potent force on the formation of the Constitutions of the States and we entertain no doubt that the States which have adopted the Federal principle of quite unequal Senatorial representation, albeit with comparatively small logic, have looked to the Federal Constitution as a guide. Reapportionment is disruptive and whether it be applied willingly as it should be through the medium of a State legislature or reluctantly by a court, it should be brought into play as gently as the Equal Protection Clause of the Federal Constitution will permit. Therefore the General Assembly should make no very broad application of the Federal principle, or as we would prefer to call it the "County principle", to the reapportionment of the Senate of the Delaware Assembly. Cf. Sobel v. Adams, 208 F.Supp. 316 (D.Fla.1962); Sims v. Frink, *id.* 431 (D.Ala.1962); Toombs v. Fortson, 205 F. Supp. 248 (1962); and Maryland Com. for Fair Representation v. Tawes, 228 Md. 412, 180 A.2d 656 (1962). We note parenthetically that the principle of apportionment of the senate of the bicameral state legislature is presently before the Supreme Court of the United States in the case last cited and in others. Of course, in a matter of this sort, the Supreme Court of the United States has the last word.

A factor which may perhaps justify some deviation from the principle of population representation in the Delaware Senate, rather strictly applied, is the fact that individual localities in the respective Counties themselves possess different views as to important local issues. Zoning will serve as an example. Whether zoning should be of general

application throughout the State of Delaware or should be applied city-wise, county-wise, or by Hundreds, is fortunately not a matter which has to be determined by this court. But the principle of close balance within one house of bicameral legislature is a desideratum. Evidence in the record supports this view. See for example the testimony of Professor Hanson. But none of the considerations which we have stated or discussed will, we think, permit any wide deviation from the principle of population representation in the apportionment of the Senate of the General Assembly of Delaware. The heaviest weight in apportionment of the Senate must be on population representation but since dislocation caused by reapportionment should be kept to the minimum and yet meet the requirements of the Fourteenth Amendment we conclude that some weight could be given to some of the factors deemed cogent in this opinion.

As to the 2 additional senators allotted to Kent and Sussex Counties superimposed on existing senatorial districts, viz., Districts 6 and 7 in Kent and Sussex Counties, so that voters in Kent and Sussex Counties will elect two senators while the voters of New Castle County will continue to vote for but one senator, this seems to involve a hidden gerrymander that cannot be countenanced and if the reapportionment created by the 1963 Amendment met the requirements of the Equal Protection Clause in all other respects, though it does not, this feature alone, in the absence of any substantial possibility of severability,[19]

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[19] See Sutherland, Statutory Construction, 3 ed. Horack, Vol. 2, pp. 174-198, Sections 2401-2419 (1943).

See also 11 American Jurisprudence Constitutional Law, Section 52, (1937) as follows: "The question may arise as to the effect of partial invalidity of a constitutional amendment. In accordance with the rules governing the invalidity of portions of a statute, it has been held that where part of an amendment to a state constitution is invalid because it violates the Fourteenth Amendment to the Federal Constitution, if the several parts of the amendment

would require us to adjudge the whole Amendment unconstitutional.

We reach the reluctant conclusion that not only is old Section 2 of Article II unconstitutional under the Equal Protection Clause but that the 1963 Amendment falls equally within the proscription of the Federal Constitution. In our opinion the 1963 Amendment and Section 2 of Article II as it existed prior thereto represent gross and invidious discrimination in respect to the value of the legislative votes of the plaintiffs and those situated like unto them. The apportionment effected by either of them is not reasonable or rational. Baker v. Carr, 206 F.Supp. 341 (D. Tenn. 1960), after remand. Moss v. Burkhardt, 207 F. Supp. 885 (D.Okla.1962); Sims v. Frink, *supra*; Sanders v. Gray, 203 F.Supp. 158 (D.Ga.1962); Toombs v. Fortson, *supra*. We have no recourse, therefore, but to declare both constitutional provisions new and old, to be unconstitutional. In so stating we are aware that there is a strong presumption that every State Constitution is constitutional when measured by the Constitution of the United States. Sobel v. Adams, *supra*. The presumption has been overpowered in the case at bar. A judgment will be entered to that effect.

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are separable, the valid portions may be saved, unless it is obvious that the intent of the adopters of the amendment was to accept one general scheme in an entirety, in which event, if part of the amendment falls, the whole must fall with it. Similarly, the inclusion in a state constitution of a clause prohibiting a greater charge by a carrier for a short than for a long haul, applying to commerce coming from or going to other states, in violation of the commerce clause of the Federal Constitution, does not render the whole article void if such an invalid provision can be eliminated and leave a complete scheme of legislative prohibition against discrimination by carriers." No possibility of severability seems to exist as to any major portion of Section 2, Article II, new or old.

Since the Federal Constitution applies, the issues must be decided by Federal law. We assume, however, that in this respect there is small if any difference between State and Federal laws. See Badger v. Hoidale, 88 F.2d 208, 211 (8 Cir. 1937).

III

But a further opportunity must be given to the General Assembly of Delaware to work out the problem of reapportionment. We acknowledge the difficult problem faced by the General Assembly of Delaware in attempting to frame a reapportionment statute that will meet the guarantee of the Equal Protection Clause of the Fourteenth Amendment. Therefore, we believe it to be within the permissive bounds of propriety for a court laboring in this field to state what it considers to be the minimal constitutional requirements under Baker v. Carr and the adjudications which have grown out of it. We have endeavored to do this to some extent under heading "II" of this opinion but we think we should go further in our attempt to lay down guidelines for the General Assembly. At least one House of the General Assembly of Delaware (the House of Representatives) must be apportioned on an equal population basis as nearly as this can be accomplished in order to meet the requirement of rationality and, further, to avoid any taint of invidious discrimination, the population in any given representaive district must not vary from the population quotient used, whatever it may be, to a degree that would be obviously unfair. As we have said, "One vote, One person" must be the aim. Gray v. Sanders, *supra*. The ideal quotient, of course, would be supplied by dividing, for example, the number of representatives, say 35, by the number of inhabitants in the State. The number "35" is, of course, not a magic number or one of art. We are of the opinion that the existing election districts may be employed as a measurement to effect this end but this does not mean that if the General Assembly should choose to reconstitute geographical areas to create new and quite different election districts it would not be within its power to do so. This court would not look upon such a result with lack of favor.

State Court decisions, prior to the Supreme Court decision in Baker v. Carr, which have attempted to formu-

late distinctions between "permissible and impermissible equality" may be of assistance to the General Assembly and its every competent counsel. Studying these cases one commentator has drawn the following conclusions: "The standard most often used by the court is a comparison between the largest and smallest district, according to population in relation to each other and the average or theoretically perfect district. These cases suggest that when the standard is equality of population, an apportionment plan resulting in one district containing more than double the population of another will be invalid. The collected state cases show that an almost equal number of legislative apportionment laws resulting in ratios of under two to one, supposedly apportioned on the basis of population have been sustained or validated, while virtually every law yielding districts with over a two to one ratio has been declared unconstitutional." See The Yale L. Journal, Vol. 72, No. 1, p. 93. For a compilation of State decisions in this regard, see *id.* pp. 101-104, Appendix B. But the validations of ratios of two to one in population referred to in the cases cited in Appendix "B" will be found, we think, to have occurred in States with larger populations and much more diverse and varied interests than those present in Delaware. A ratio of two to one is one of 100% and we can perceive no sound basis for such a broad ratio in this State. In fact, under the plaintiffs plan referred to in the Appendix of this opinion, the largest discrepancy is actually, as we estimate it, only a little more than 50% and this is compiled in the three or four instances in which it occurs by the use of existing representative districts. Some latitude can be allowed as a practical matter but it must be such as is required by the geography and mathematics of the situation and must not be too great. There has been no evidence or any acceptable argument of counsel presented in this case which would warrant a conclusion that a proportion of even slightly more than 50% would be constitutionally acceptable, save

possibly, as we have indicated already, in those few situations referred to in the testimony of the political scientists of the plaintiffs, where a slightly higher deviation than 50% is compelled by adhering to the present lines of contiguous election districts. Compare by way of example, the plaintiffs' plan for apportionment of the House of Representatives and the ratios therein set out based upon the combining of contiguous election districts as they now exist without overlapping county boundaries.

As we have stated and as we hope we have made clear to everyone who will read this opinion, the 1963 Amendment allocates 7 senators to each County but the 7 senators alloted to New Castle County represent a geographical area containing 69% of the population of Delaware. A House of Representatives elected on a strict population basis and a Senate elected on a strict area basis as provided by the 1963 Amendment could give the majority of the voters a veto power but it could not assure them legislative strength to take affirmative action on measures which might be very necessary for the general welfare of the State.

Such affirmative action must be rendered possible and, as we have already indicated, an apportionment should not be permitted that would allow a blockage of major legislation desired by the great majority of electors of Delaware to come to pass in the Senate. Effecting the will of the majority of the people of a State must be deemed to be the foundation of any apportionment plan. Applying this principle, it seems clear that the House of Representatives must be apportioned on a strict population basis. However, other cogent and relevant factors, as indicated in this opinion, may be accorded some weight in apportioning the Senate of the General Assembly of Delaware: provided, nonetheless, as we have said, that in apportioning senatorial districts vis-a-vis each other *within* the three Counties the aim must be "One vote, One person".

To give effect to such factors, indicated herein to be of cogency, relevancy, and of some weight, in apportioning the Senate of the General Assembly of Delaware as a whole, should not be thought of as necessarily destroying the foundation principle of majority rule, or effecting invidious discrimination or irrationality in apportionment. We state again, however, at the risk of needles repetition, that giving effect to the factors referred to must not be allowed to govern to such an extent that an area containing a substantial portion of the population of Delaware, *vide ante* New Castle County containing 69% of the population of Delaware, could be put in such an inferior position in respect to the Senate that legislation needed for the good of the whole State might be blocked. What we have said is, of course, precatory and not absolute. We cannot foresee what the General Assembly in its wisdom may see fit to effect.[20]

We say again, as we have stated in this opinion and in other opinions in this case and during the course of the trial, that the primary duty of apportionment must rest with the General Assembly. This court should not be compelled to embark upon the task of reapportionment because of legislative reluctance. The good of the State requires careful, even prayerful, study of all relevant factors and circumstances and the consideration of whole State interests, and a well-devised, reasonable and fair plan of apportionment. The matter is one which requires expert

[20] In considering these standards we noted that in Delaware there is no provision for apportionment by popular referendum. Apportionment is locked in the breast of the General Assembly of Delaware which itself was elected contrary to the provisions of the Constitution of the United States. We recognize, adhere to, and believe relevant to the standards articulated the principle that both form and power of government are derived from the consent of the governed. Were this principle operative in Delaware, i. e., provision for the General Assembly to be determind by popular concensus, a different problem might be presented. See McCloskey, The Reapportionment Case, 76 Harv.L.R. 54 (1963).

assistance, as we testify to from our own knowledge. The General Assembly, constituted under old Section 2 of Article II will be freed of the apportionment provisions of Section 2 of Article II, old and new, by our judgment in this case. It may then proceed to pass an apportionment statute meeting the requirements of the Fourteenth Amendment and those of Section 3 of Article I of the Constitution of Delaware which we, as presently advised, regard as substantially identical. We wish to make it clear, however, that there is doubt as to the length of continuance of the *de facto* existence of the 122nd General Assembly beyond the present terms of its members as provided by Section 2 of Article II which we shall declare unconstitutional. Cf. Section 1 of Article II. In so stating we are aware of the statements respecting this issue in Scholle v. Hare, 367 Mich. 350, 116 N.W.2d 350, 357 (1962). We point out, for example, that if a bond issue had to be authorized by the present General Assembly in, say, February 1965 on the theory of the *de facto* continuing powers of its members, financial authorities might look with some hesitancy upon the sale of securities so authorized. In our present-day complex modern economic civilization surety in financial matters seems to be of the essence. We state again that this court has not the slightest desire to deprive the citizens or the General Assembly of this State of their rights, nor have we any desire to assume their responsibilities.

IV

The State of Delaware, the General Assembly, and this court all seem to be trapped in a kind of box of time. The exigencies of the calendar and the oncoming general election of 1964 confront us. We will allow a reasonable period for the General Assembly to proceed to try its hand again at the problem of reapportionment. We cannot withhold the entry of our judgment on this phase of the case, however, for if we did so the General Assembly would be with-

out power to act except by way of a further attempt to create a valid constitutional amendment. This would require action again by two successive General Assemblies under Section 1 of Article XVI of the Constitution of Delaware, or by a Constitutional Convention under Section 2 of Article XVI. The latter would itself present a grave danger of an unconstitutional result by reason of a possible denial of equal protection of the laws because of the convention-delegate apportionment set up by Section 2 of Article XVI, Del.C.Ann. A third possibility would be a Constitutional Convention, called by the Governor or by proper citizenry action under the doctrine of the inherent right of the citizens of a State to create or revise their Constitution. Cf. Wells v. Bain, 75 Pa. 39 (1874). Such a gross predicament, a miscarriage of the power inherent in the people of this State, cannot be avoided by assuming that *de facto* powers would inhere in the members of the 122nd General Assembly of Delaware past the terms prescribed for them by Section 2 of Article II of the Delaware Constitution for there could not be two valid successive General Assemblies to effect a valid revision of Section 2 of Article II unless by virtue of an election system established by the decree of this court. The action to be taken by the 122nd General Assembly upon the entry of our judgment cannot be anemic in its nature.

Having the box of time in mind the provisions of Rule 16 of this court will be strictly adhered to. Within 5 days of the filing of this opinion or within 5 days from the date of the denial of rehearing, whichever shall be the later, the parties are to prepare a decree and submit it to the court. We of course must allow the General Assembly a reasonable time in which to fulfill its duties. Accordingly we will allocate to the General Assembly a period of time from the date of the entry of our final decree up to and including October 1, 1963, to prepare and enact into law a reapportionment statute acceptable under the law and the guidelines we have endeavored to lay down herein. After

our final decree has been entered, if no appeal to the Supreme Court has been filed in the meantime, we may have further hearings upon a plan of reapportionment to be ready to be applied as a temporary alleviant only while the General Assembly fulfills its duty.

Relevant pending motions will be held in abeyance as and until the court advises itself further.

Further relief will be denied to the plaintiffs at this time but this denial shall be deemed to be without prejudice.

Findings of Fact and Conclusions of Law are set out in this opinion in accordance with rule 52(a) Fed.R.Civ.Proc., 28 U.S.C.

For the Court

JOHN BIGGS, JR.,
U. S. Circuit Judge

April 17, 1963.

APPENDIX

SOME OBSERVATIONS RESPECTING THE PLAINTIFFS' MINIMUM PLAN

The plaintiffs have submitted a plan of apportionment and their efforts have been of very substantial assistance to the court. The remarks made hereinafter are not intended to decry the validity of their efforts but we think we should state the following.

The difficulty of framing an efficacious apportionment plan cannot be overestimated. The plan must not only be consistent with the guarantee of the Equal Protection Clause but must also be workable in the pragmatic day-to-day sense.

The plaintiffs' plan is premised on the concept that population is the substantial and vital factor in apportionment.

Using the representative districts set out in Article II, Section 2 of the Delaware Constitution as the basic unit, the following four rules were used by the plaintiffs to arrive at new representative districts: (1) the small districts are consolidated and extra representatives allocated to large districts so as to minimize the disparity in population per representative: (2) only contiguous districts are consolidated and a consolidated district cannot cross county or City-of-Wilmington lines; (3) districts are compact; and (4) no district larger than the ideal size, 12,751,[1] is consolidated. By applying these rules to the formulation of representative districts the plaintiffs establish an apportionment which apparently, with few exceptions, does not have more than a 50% population deviation per representative per district. Of the 35 representatives, 7 are allocated to the City of Wilmington, 17 to rural New Castle County, 5 to Kent County and 6 to Sussex County. These districts were presented on maps.[2] A chart compilation of the maps showed:

Rep. Dist.	Pop.	No. of Reps.
Wilmington:		
1 & 4	12,208	1
2	33,772	3
3	18,359	1
5	30,488	2
Total	95,827	7

[1] This is the figure arrived at by dividing the total population of Delaware by 35, the number of representative districts.

[2] The maps did not show the precise bounds of the representative districts. To the extent that the plan is based on Section 2, Article II, representative districts and their exact metes and bounds can be ascertained from the Delaware Code.

Rural N.C.:		
6	58,228	4
7	47,509	4
8	23,428	2
9	20,040	2
10	40,293	3
11	9,325	1
12, 13, 14, 15	12,796	1
Total	211,619	17
Total N.C.	307,446	24
Kent:		
1, 3, 4	13,161	1
2	17,806	1
5	9,125	1
6, 9, 10	12,511	1
7, 8	13,048	1
Total	65,651	5
Sussex:		
1	9,641	1
2, 3	15,876	1
4, 5	13,458	1
6, 9	12,281	1
7, 8	9,580	1
10	12,359	1
Total	73,195	6
Total State	446,292	35

In presenting the plan in the first instance, the plaintiffs did not divulge whether those districts which were to have more than one representative were to elect these at-large or whether further line-drawing was required. Had this point been overlooked and had this court adopted the plan as originally proposed, it would not have been possible for the election boards to conduct an orderly election without making allocations which could not be found to be in fact or in law within their spheres of responsibility. On cross-examination this deficiency appeared and thereafter counsel for the plaintiffs agreed to present further evidence concerning sub-division of the districts with more than one representative.

The plan as first presented was supplemented as follows: Proposed representative districts entitled to more than one representative were broken into smaller ones by allocation of the existing election districts within the proposed representative district.[3] The population of these new representative districts was computed by determining which census enumeration districts they encompassed.[4] Upon analysis of the plaintiffs' submissions the court has found a number of errors that illustrate vividly the extreme difficulty of apportioning a State in a mathematically correct and workable fashion.

Besides some unimportant clerical errors, the plan had one error respecting census figures that could have had substantial impact. The figure 920 was given for one enumeration district when in fact the correct figure is 95. When the constitutionality of a statute depends in relevant part on mathematics such an error is significant.

In the City of Wilmington, two proposed representative districts included the existing 4th election district of the 9th Ward. In other words, there was an overlap. Also, in the City of Wilmington the existing 6th election district of the 9th Ward is not included in any proposed representa-

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[3] An example will clarify this principle. The 6th Representative District, Brandywine Hundred, had allocated to it 4 representatives under the proposed plan. This Representative District was broken down into 4 representative districts by allocation of existing election districts. The 1st Representative District of Brandywine Hundred was comprised of 11 election districts, 1, 5, 7, 8, 18, 23, 25, 26, 34, 37 and 47, all necessarily in that Hundred. The other 3 representative districts include all other election districts in Brandywine Hundred.

[4] Census enumeration districts are the official unit of the United States Bureau of Census. They are disclosed on maps of public record. Where election district and census enumeration district lines did not coincide, estimates of population apparently were made by the plaintiffs' experts.

tive district and thereby a substantial number of citizens would be disenfranchised.

In many new representative districts, representative districts broken down from larger districts, census enumeration districts were included when they should have been excluded, or excluded when they should have been included. For example, in the proposed First Representative District in New Castle Hundred parts of enumeration districts 193p, 193s, and 193r were included when they should have been excluded. To the extent they were erroneously included, the population for the proposed district is overstated. The erroneous exclusion or inclusion of enumeration districts in representative districts throws population figures askew. When one vote-one person is the aim, it is impossible to hit the bull's eye with a defectively sighted weapon.

Even if there were no such mistakes there would be a problem of computing the precise population of the new representative districts. This problem is caused by the fact that existing election district lines do not precisely coincide with enumeration district boundaries. Thus, when an election district line cuts through an enumeration district only an estimate can be made of how many people reside on either side of the line.

These problems of arriving at the correct population figures for the new representative districts would not arise if elections were conducted at-large within the hundreds. This follows from the fact that neither election districts nor enumeration districts cross hundred lines. For example, three enumeration districts in part are erroneously included in the proposed First Election District in New Castle Hundred. The effect of such a mistake could be corrected by an election at-large within that Hundred. The Representative District would be the whole rather than a part of New Castle Hundred, and since those and all other enumeration districts within New Castle Hundred do not

cross the hundred lines, the population of the Hundred can be correctly estimated.

The plaintiffs' plan calls for apportioning the Senate strictly on a population basis. It calls for 19 Senators, 4 from the City of Wilmington, 9 from rural New Castle County, 3 from Kent County and 3 from Sussex County. The senatorial districts are created by combining proposed representative districts. Since apportionment of the Senate is based on representative districts, the Senate plan necessarily incorporates all clerical errors made in the House plan; however, it minimizes the exclusion-inclusion problem concerning enumeration districts. A simple example will demonstrate the latter. If representative district "A" erroneously includes enumeration district "X" which should be in representative district "B", the combination of the two into a senatorial district will cancel out the mistake. The fact that larger populations exist in the senatorial districts makes any error in population estimates relatively less damaging. One misstatement as to population was found resulting from the erroneous inclusion of an enumeration district.

WRIGHT, *District Judge*, concurring.

I join my Brothers Biggs and Layton in holding: (1) Article II, Section 2 is incidiously discriminatory and unconstitutional because of its gross population disparities that cause debasement of voting rights; (2) Article II, Section 2 as amended is invidiously discriminatory and unconstitutional because of its gross population disparities that cause debasement of voting rights; and (3) the House of the General Assembly must be based strictly on population. One vote—one person is the aim.

I agree with my Brother Biggs' precatory observation that the Senate must be based substantially on population. But all other factors accepted in the majority opinion as justification for deviation from the population principle

may be invoked so long as the majority principle is adhered to.

LAYTON, *District Judge*, concurring in part and dissenting in part.

While concurring in the result reached by the majority, I am unable to agree with certain conclusions, both of law, and fact,[1] concerning the Delaware Senate. My views will be briefly stated.

We have just concluded that not only the House of Representatives created by Article 2 Sec. 2 of our Constitution but also the House created by the 1963 Amendment are both invalid because offensive to the equal protection clause of the Federal Constitution. In this I believe we are on firm ground. True, the Federal Supreme Court has not said in so many words that at least one of the branches of a state legislature must be composed of representatives elected strictly on a population basis. Yet the gleanings from certain of the concurring opinions in Baker v. Carr, as well as the expressions of most of the lower courts which have since spoken upon the subject,[2] point implacably in that direction.

But, having declared both the old and new Lower Houses to be invalidly created under federal constitutional standards, I think it unnecessary to proceed further and declare the State Senate to be invalidly constituted. This is so because the 1963 Amendment to Article 2 Sec. 2 of the Delaware Constitution contains no severability clause and the great weight of authority is to the effect that, in such event, the entire Act must fall. Carter v. Carter Coal Co.,

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[1] My disagreement with certain facts found by the majority plays no important part in this concurring opinion. If the time should arrive when these factual considerations should become relevant, I will cover the subject in a very short memorandum opinion.

[2] For instance see Toombs v. Fortson, C.A. 7883, July 13, 1962 (U.S.D.C.N.D.Ga.).

298 U.S. 238 (316); 2 Southerland Statutory Constriction, Sec. 2403.[3]

Moreover, it is a settled principle of judicial approach that a Court should avoid passing on the constitutionality of an Act unless such adjudication is unavoidable. Alma Motor Co. v. Timken-Detroit Axle Co., 329 U.S. 129. Here, because the whole Act falls due to the lack of a severability clause, it becomes unnecessary to go further and consider the validity of the State Senate upon constitutional grounds and, in my judgment, we should avoid doing so. However, because of the unusual nature of these proceedings some broad, general guide lines might be laid down by way of dictum.

Nor can I agree with the conclusions of the majority that the State Senate is invalidly created because (1) the members are elected upon the basis of an equal number from each county rather than substantially upon a population basis, and (2) of the so-called super-senator device whereby voters in the Lower Counties are casting a vote for two senators while those in New Castle are voting for only one.

The majority finds an invidious discrimination in the fact that voters from New Castle County, containing sixty-nine per cent of the State's population, can elect but seven senators while the voters of the two Lower Counties, containing but roughly 15 per cent each of the population, are permitted to elect the same number of senators.

With deference, I can find nothing constitutionally wrong in the make up of a State Legislature composed of a Lower

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[3] The rationale underlying the authorities above cited is that a Legislature would never have intended the passage of an Act had it realized that one part was unconstitutional. Certainly it is difficult to imagine that the Delaware Legislature would have passed the 1963 Amendment had it known that the important portion thereof constituting the House of Representatives was invalid.

House whose members are elected upon a strict population basis and an Upper House whose members are elected in equal numbers from each County.[4] This is the way our Federal Congress is constituted. True, the analogy between a State Legislature and the Federal Congress is not exact. For one thing, the states are sovereign while the counties are not. More importantly, under the 1963 amendment, an invidious discrimination could well be found to exist on an intra-county basis in the composition of the Senate which would necessitate a redistricting. For instance, the 4th Senatorial District of New Castle County with a population of 64,000 has one senator, while the 7th Senatorial District of the same county has 4,000. Nevertheless, while not exact, the broad analogy is clear and to my mind it is incongruous to hold that a state legislature patterned upon lines precisely similar to those of the federal system is unconstitutional because offensive to the Equal Protection Clause of the Federal Constitution.

My recollection of the record is that there are seven states whose legislatures are patterned exactly on the federal system. So far as I am aware, until recently no one has seriously challenged their validity. The Supreme Court of the United States has never expressed any view on the subject, nor, as far as I have found, have any legal text writers. Nothing in Baker v. Carr suggests that the expression "invidious discrimination" was aimed at a State Senate composed of equal numbers from each county where there also existed a Lower House whose membership was elected on a strict population basis. Rather, I think it should be assumed that these words were directed at situations akin to our 6th Representative District of Brandywine Hundred, having a population of over 58,000, vis-a-vis the 15th Representative District of Blackbird

[4] By this I mean that the so-called federal system should be regarded as setting *minimum* standards. No valid reason exists why a county having a very large population should not have more senators than a much smaller county.

Hundred, in which the population is about 1,600, with the result that a vote for a State Representative in the 6th District of Brandywine is worth about one-thirtieth of a vote in the 15th District of Blackbird Hundred. As a practical matter, no more glaring example of "invidious discrimination" can be found than in general elections where a voter in Nevada, having a population of approximately 285,000, casts a vote for a United States Senator while at the same time a voter in the State of New York, having a population of 16,750,000, casts his vote for a United States Senator.

Since the so-called federal system has withstood 175 years of stress and strain in the national political arena, I can see no valid reason for interfering with the composition of a State Legislature modeled exactly on it.

The majority has also found unconstitutional the 1963 Amendment in so far as it concerns the creation of 2 so-called super senators from each of the two Lower Counties in order to equalize the number of senators from each County at 7. This was a most unfortunate business. Speaking as an individual, I would agree with the majority that the result is sheer gerrymandering, but speaking as a judge I am unable to find such an action invalid because, in my view, a Senate composed of an equal number of senators from each county is not an unconstitutionally created body, providing the membership of the Lower House is elected on a strict population basis. And simply because the Legislature chose a dubious path by which to arrive at a valid result is not grounds for judicial interference.[5]

[5] The majority laid emphasis on the fact that voters in the two Lower Counties will now vote for two state senators while in New Castle County they can vote for only one. This reasoning is not without merit but since the end result is the election of seven senators from each County and because, in my view, the value of a vote for a state senator varies throughout the state because of population differences, I am not persuaded that the result offends the Equal Protection Clause.

In conclusion, I concur in the result reached by the majority in holding that the State Senate as created by the 1963 Amendment to Art. 2 Sec. 2 of the Constitution must fall but upon the single ground that the Amendment, containing no severability clause, the entire Act must fall. With the other conclusions arrived at by the majority I must respectfully disagree.

APPENDIX B

DECREE BELOW

[Caption omitted.]

DECREE

AND NOW, to wit, this 30th day of April, 1963,

IT IS ORDERED, ADJUDGED AND DECREED as follows:

(1) That Section 2 of Article II of the Constitution of Delaware of 1897 as it existed prior to the Amendment effected by the 121st and 122nd General Assemblies of the State of Delaware is invalid and unconstitutional; and

(2) That the Amendment to Section 2 of Article II of the Constitution of Delaware of 1897, as effected by the 121st and 122nd General Assemblies of the State of Delaware, is invalid and unconstitutional; and

(3) That relevant pending motions be held in abeyance as and until the court advises itself further; and

(4) That further relief be denied to the plaintiffs at this time, this denial, however, being without prejudice, the court expressly reserving jurisdiction to itself to make such further orders as it may deem necessary and proper including orders granting injunctive or mandatory relief in respect to the holding of Primary, General or Special Elections for Representatives or Senators in the General Assembly of the State of Delaware.

JOHN BIGGS, JR.
U. S. Circuit Judge

CALEB M. WRIGHT
U. S. District Judge

CALEB R. LAYTON, 3rd
U. S. District Judge

APPENDIX C

INJUNCTION BELOW

[Caption omitted.]

INJUNCTION

BIGGS, *Circuit Judge*, and WRIGHT and LAYTON, *District Judges*.

AND NOW, to wit, this 20th day of May, 1963, it appearing that this Court on April 17, 1963, filed findings of fact and conclusions of law, as required by Rule 52(a), Fed. R. Civ. Proc., 28 U.S.C., set out in an opinion, determining and declaring that Section 2 of Article II of the Constitution of the State of Delaware of 1897 as it existed prior to the amendment effected by the 121st and 122nd General Assemblies of the State of Delaware is invalid and unconstitutional and also that the amendment to Section 2 of Article II of the Constitution of 1897 as effected by the 121st and 122nd General Assemblies of the State of Delaware is invalid and unconstitutional; and it further appearing that this Court on April 30, 1963, entered a final decree declaring and adjudging that the constitutional provisions referred to are invalid and unconstitutional, but nonetheless expressly reserved jurisdiction to make such further orders granting injunctive or mandatory relief in respect to the holding of Primary, General or Special Elections for Representatives or Senators in the General Assembly of the State of Delaware as it might deem necessary or proper,

IT IS ORDERED, ADJUDGED AND DECREED that the defendants in this proceeding and each of them, or their successors in office and each or any of them, be and they hereby are enjoined and restrained from conducting or holding any Special or Primary Elections, and the General Election scheduled to be held on Tuesday, November 3, 1964, or certifying to the results thereof, insofar as said elections, or any of them, pertain, or pertains, to the election of

members of the General Assembly of Delaware under the apportionment provisions of the Constitution of Delaware, hereinbefore referred to, viz., Section 2 of Article II of the Constitution of the State of Delaware as they existed prior to the amendment effected by the 121st and 122nd General Assemblies of the State of Delaware or as they exist in Section 2 of Article II of the Constitution of the State of Delaware as effected by the 121st and 122nd General Assemblies of the State of Delaware; and

IT IS FURTHER ORDERED AND DECREED that this injunction shall remain in full force and effect unless stayed or hereafter set aside; and

IT IS FURTHER ORDERED that further relief be denied to the plaintiffs at this time, this denial, however, being without prejudice, the court expressly reserving jurisdiction to itself to make such further orders as it may deem necessary and proper including orders granting injunctive or mandatory relief in respect to the holding of Primary, General or Special Elections for Representatives or Senators in the General Assembly of the State of Delaware.

(S) JOHN BIGGS, JR.
U. S. Circuit Judge

(S) CALEB M. WRIGHT
U. S. District Judge

(S) CALEB R. LAYTON, 3rd
U. S. District Judge

APPENDIX D

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

"Section 1. • • • No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

• • • • • •

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

2. The apportionment provisions of the Delaware Constitution of 1897 provide as follows:

ARTICLE II.

LEGISLATURE

Section 1. The legislative power of this State shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives.

Section 2. The House of Representatives shall be composed of thirty-five members, who shall be chosen for two years. The Senate shall be composed of seventeen members, who shall be chosen for four years.

The State is hereby divided into thirty-five Representative Districts from each of which shall be chosen, by the qualified electors thereof, one Representative. In New Castle County there shall be fifteen Representative Districts, numbered from one to fifteen inclusive; in Kent County, ten Representative Districts, numbered from one to ten inclusive; and in Sussex County, ten Representative Districts, numbered from one to ten inclusive. The State is also hereby divided into seventeen Senatorial Districts,

from each of which shall be chosen, by the qualified electors thereof, one Senator. In New Castle County there shall be seven Senatorial Districts, numbered from one to seven inclusive; in Kent County, five Senatorial Districts, numbered from one to five inclusive; and in Sussex County, five Senatorial Districts, from one to five inclusive.

The Representative Districts in New Castle County are and shall be as follows:

* * * * *

[Here follow the boundaries of Representative Districts One through Five in the City of Wilmington.]

Number Six. Brandywine Hundred.

Number Seven. Christiana Hundred.

Number Eight. Mill Creek Hundred.

Number Nine. White Clay Creek Hundred.

Number Ten. New Castle Hundred.

Number Eleven. Pencader Hundred.

Number Twelve. Red Lion Hundred.

Number Thirteen. St. Georges Hundred.

Number Fourteen. Appoquinimink Hundred.

Number Fifteen. Blackbird Hundred.

The Representative Districts in Kent County are and shall be as follows:

Number One. Duck Creek Hundred.

Number Two. Little Creek Hundred and the first Election District of East Dover Hundred.

Number Three. Kenton Hundred.

* * * * *

[Boundaries of Representative Districts Four, Five and Six in Kent County omitted.]

Number Seven. All that portion of North Murderkill Hundred not included in District Number Six.

Number Eight. All that portion of South Murderkill Hundred not included in District Number Six.

Number Nine. All that portion of Mispillion Hundred not included in District Number Six.

Number Ten. Milford Hundred.

The Representative Districts in Sussex County are and shall be as follows:

Number One. Cedar Creek Hundred.

* * * * *

[Boundaries of Representative Districts Two and Three in Sussex County omitted.]

Number Four. Broad Creek Hundred.

Number Five. Little Creek Hundred.

Number Six. Dagsboro and Gumboro Hundreds.

Number Seven. Baltimore Hundred.

Number Eight. Indian River Hundred.

Number Nine. Georgetown Hundred.

Number Ten. Broadkiln and Lewes and Rehoboth Hundreds.

The Senatorial Districts in New Castle County are and shall be as follows:

Number One. All that portion of the City of Wilmington lying north of and bounded by a straight line including the central line of Eighth Street extending from the Delaware River to the westerly boundary of said City.

Number Two. All that portion of the said City lying south of and bounded by the straight line aforesaid including the central line of Eighth Street.

Number Three. Brandywine Hundred, together with all that portion of Christiana Hundred lying north of and bounded by the central line of Lancaster Turnpike.

Number Four. Mill Creek Hundred, together with all that portion of Christiana Hundred lying south of and bounded by the central line of the Lancaster Turnpike.

Number Five. White Clay Creek Hundred, Red Lion Hundred and New Castle Hundred.

Number Six. Pencader Hundred and St. Georges Hundred.

Number Seven. Appoquinimink Hundred and Blackbird Hundred.

The Senatorial Districts in Kent County are and shall be as follows:

Number One. The First and Second Representative Districts.

Number Two. The Third and Fourth Representative Districts.

Number Three. The Fifth and Seventh Representative Districts.

Number Four. The Sixth and Ninth Representative Districts.

Number Five. The Eighth and Tenth Representative Districts.

The Senatorial Districts in Sussex County are and shall be as follows:

Number One. The First and Second Representative Districts.

Number Two. The Third and Fourth Representative Districts.

Number Three. The Fifth and Sixth Representative Districts.

Number Four. The Seventh and Eighth Representative Districts.

Number Five. The Ninth and Tenth Representative Districts.

All territory which shall hereafter be added to and included within the City of Wilmington shall become part of the Representative Districts in New Castle County, as follows:

* * * * *

[More boundaries omitted.]

All territory which shall hereafter be added to and included within the City of Wilmington shall become part of the Senatorial Districts in New Castle County as follows:

* * * * *

[Still more boundaries omitted.]

Whenever by the extension of the limits of the City of Wilmington territory forming part of any Representative or Senatorial District, as hereby established, shall be included within the limits of the said City, such Representative or Senatorial District shall thereafter consist of the residue thereof, not so included within said limits.

The several Representative and Senatorial Districts in the State shall, except as herein otherwise provided, continue to be bounded, described and defined by the lines of the hundreds, wards, election districts, public roads, railroad and other boundaries herein mentioned, as the same are now established and located.

* * * * *

3. The amendment provisions of the Delaware Constitution of 1897 are as follows:

ARTICLE XVI.

AMENDMENTS AND CONVENTIONS

Section 1. Any amendment or amendments to this Constitution may be proposed in the Senate or House of Representatives; and if the same shall be agreed to by two-thirds of all the members elected to each House, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon, and the Secretary of State shall cause such proposed amendment or amendments to be published three months before the next general election in at least three newspapers in each County in which such newspapers shall be published; and if in the General Assembly next after the said election such proposed amendment or amendments shall upon yea and nay vote be agreed to by two-thirds of all the members elected to each House, the same shall thereupon become part of the Constitution.

Section 2. The General Assembly by a two-thirds vote of all the members elected to each House may from time to time provide for the submission to the qualified electors of the State at the general election next thereafter the question, "Shall there be a Convention to revise the Constitution and amend the same?"; and upon such submission, if a majority of those voting on said question shall decide in favor of a Convention for such purpose, the General Assembly at its next session shall provide for the election of delegates to such convention at the next general election. Such Convention shall be composed of forty-one delegates, one of whom shall be chosen from each Representative District by the qualified electors thereof, and two of whom shall be chosen from New Castle County, two from Kent County and two from Sussex County by the qualified electors thereof respectively. The delegates so chosen shall convene at the Capital of the State on the first Tuesday in September next after their election. Every delegate shall receive for his services such compensation

as shall be provided by law. A majority of the Convention shall constitute a quorum for the transaction of business. The Convention shall have power to appoint such officers, employees and assistants as it may deem necessary, and fix their compensation, and provide for the printing of its documents, journals, debates and proceedings. The Convention shall determine the rules of its proceedings, and be the judge of the elections, returns and qualifications of its members. Whenever there shall be a vacancy in the office of delegate from any district or county by reason of failure to elect, ineligibility, death, resignation or otherwise, a writ of election to fill such vacancy shall be issued by the Governor, and such vacancy shall be filled by the qualified electors of such district or county.

Section 3. The General Assembly shall provide for receiving, tallying and counting the votes for or against a Convention, and for returning to the General Assembly at its next session the state of such vote; and shall also enact all provisions necessary for giving effect to this Article.

Section 4. No bill or resolution passed by the General Assembly under or pursuant to the provisions of this Article shall require for its validity the approval of the Governor, and the same shall be exempt from the provisions of Section 18 of Article III, of this Constitution.

* * * * *

4. The 1963 reapportionment amendment to the Delaware Constitution (54 Laws of Delaware, Chapter 1, effective January 17, 1963; House Bill 574, 121st General Assembly; House Bill 3, 122nd General Assembly) is as follows:

AN ACT AGREEING TO A PROPOSED AMENDMENT TO ARTICLE II OF THE CONSTITUTION OF THE STATE OF DELAWARE, RELATING TO THE COMPOSITION OF THE HOUSE AND SENATE, BY PROVIDING FOR EXPANSION, AND REAPPORTIONMENT.

WHEREAS, an amendment to the Constitution of the State of Delaware was proposed to the 121st General Assembly as follows:

"AN ACT PROPOSING AN AMENDMENT TO ARTICLE II OF THE CONSTITUTION OF THE STATE OF DELAWARE, RELATING TO THE COMPOSITION OF THE HOUSE AND SENATE, BY PROVIDING FOR EXPANSION AND REAPPORTIONMENT.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (TWO-THIRDS OF ALL MEMBERS ELECTED TO EACH HOUSE THEREOF CONCURRING THEREIN):

Section 1. Paragraphs 1 and 2 of Section 2 of Article II of the Constitution are hereby amended to read:

The House of Representatives shall be composed of thirty-five members, plus such additional members as shall be provided pursuant to Section 2A of this Article, who shall be chosen for two years. The Senate shall be composed of twenty-one members, who shall be chosen for four years.

The State is hereby divided into thirty-five Representative Districts. There shall be such additional Representative Districts as shall be provided pursuant to Section 2A of this Article. From each Representative District there shall be chosen, by the qualified electors thereof, one Representative. The State is also hereby divided into twenty-one Senatorial Districts, from each of which shall be chosen, by the qualified electors thereof, one Senator. In New Castle County there shall be seven Senatorial Districts, numbered from one to seven inclusive; in Kent County, seven Senatorial Districts, numbered from one to seven inclusive; and in Sussex County, seven Senatorial Districts from one to seven inclusive.

Section 2. The following words are hereby added after the words: "Number Five. The Eighth and Tenth Representative Districts", in that part of Article II, Section 2 of the Constitution dealing with the Senatorial Districts in Kent County:

Number Six, at Large: The first, second, fifth, seventh and eighth Representative Districts.

Number Seven, at Large. The third, fourth, sixth, ninth and tenth Representative Districts.

Section 3. The following words are added following the words "Number Five. The Ninth and Tenth Representative Districts", in that part of Article II, Section 2 of the Constitution dealing with the Senatorial Districts in Sussex County:

Number Six, at Large. The first, second, third, fourth and Fifth Representative Districts.

Number Seven, at Large. The sixth, seventh, eighth, ninth and tenth Representative Districts.

Section 4. The following words are added immediately following the words added by Section 3 above:

The first Senators elected from the Sixth Senatorial Districts of Kent and Sussex Counties shall serve for a two year term only, thereafter their successors shall serve for a full four year term.

Section 5. The following new Section 2A is added to Article II of the Constitution, immediately following Section 2:

Section 2A. In addition to the existing 35 Representative Districts as set forth in Section 2 of this Article, there shall be additional Representative Districts as hereafter provided.

Each existing Representative District as set forth in Section 2 of this Article, with a population residing therein in excess of 15,000, as shown by the last official federal decennial census shall be entitled to one additional Representative for each additional 15,000 population or major fraction thereof residing within the District.

Upon any Representative District, as set forth in Section 2 of this Article, being entitled to more than one Repre-

sentative, it shall be sub-divided into new Representative Districts for each additional Representative to which it is entitled, from which shall be chosen by the qualified electors thereof, a Representative.

After each official federal decennial census the new Representative Districts created pursuant to this Section shall be abolished and the Representative Districts set forth in Section 2 of this Article shall again be re-divided as set forth herein.

The sub-dividing of the Representative Districts as set forth herein shall be done by a Redistricting Commission, consisting of the Governor, as Chairman, and the State Chairman of the two political parties receiving the largest vote for Governor at the preceeding election for Governor as advisors to the Governor. Redistricting and reapportioning by the Commission as set forth herein shall be accomplished in accordance with the following criteria: Each new Representative District shall, insofar as is possible, be formed of contiguous territory; shall be as nearly equal in population as possible to the other new districts being created within the existing Representative District; shall be bounded by ancient boundaries, major roads, streams, or other natural boundaries; and not be so created as to unduly favor any person or political party.

Within 120 calendar days following the official reporting to the President of the United States of each decennial census, (or within 120 calendar days after this amendment takes effect) the Governor, on behalf of the Commission, shall file with the Secretary of State the plan for redistricting and reapportioning as provided for herein. Forthwith, after the filing, the Governor shall issue a proclamation of redistricting and reapportioning. The Secretary of State shall cause such proclamation to be published in two newspapers of general circulation within the State for two consecutive weeks, within 20 days after the issuance of the proclamation. The proclamation shall become effective within 30 days of its issuance.

Any qualified voter may apply to the Superior Court to compel the Governor, by mandamus or otherwise, to perform the redistricting and reapportioning duties or to correct any error in redistricting and reapportioning. Application to compel the Governor to perform the redistricting and reapportioning duties must be filed within thirty days of the expiration of the 120 days allotted to the Commission to file its plan, if such plan is not timely filed. Application to compel correction of any error in redistricting and reapportioning must be filed within thirty days following the proclamation. Original jurisdiction in these matters is hereby vested in the Superior Court. On appeal, the cause shall be reviewed by the Supreme Court upon the law and the facts.

Section 6. The following new Section 2B is added to Article II of the Constitution, immediately following Section 2A as enacted above.

Section 2B. The number of delegates and the method of electing delegates to the Constitutional Convention as provided in Section 2, Article 16, shall not be effected by the addition of Representatives or Representative Districts, pursuant to Section 2A of this Article. The Representative Districts which shall elect delegates to the Constitutional Convention are as set forth in Section 2 of this Article.", AND

WHEREAS, the said proposed amendment was agreed to by two-thirds of all the Members elected to each House in the said 121st General Assembly, NOW, THEREFORE

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (TWO-THIRDS OF ALL THE MEMBERS ELECTED TO EACH HOUSE CONCURRING THEREIN):

Section 1. The said proposed amendment is agreed to and adopted and shall forthwith become a part of the Constitution.

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IN THE

Supreme Court of the United States

October Term, 1963.

No. 307.

MABEL V. ROMAN, Clerk of the Peace for New Castle County; WALTER A. HANDSBERRY, Clerk of the Peace for Kent County; I. ROBERT WILLEY, Clerk of the Peace for Sussex County; et als.,

Appellants,

v.

RICHARD SINCOCK, et als.

Appeal From the United States District Court for the District of Delaware.

MOTION TO AFFIRM.

VINCENT A. THEISEN,
1118 Wilmington Trust Biulding,
Wilmington, Delaware,
Attorney for Appellees.

August, 1963.

International, 711 So. 50th St., Phila. 43, Pa.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1963.

No. 307.

MABEL V. ROMAN, CLERK OF THE PEACE FOR NEW CASTLE COUNTY; WALTER A. HANDSBERRY, CLERK OF THE PEACE FOR KENT COUNTY; I. ROBERT WILLEY, CLERK OF THE PEACE FOR SUSSEX COUNTY; ET ALS., APPELLANTS,

v.

RICHARD SINCOCK, ET ALS.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

MOTION TO AFFIRM.

Appellee in the above-entitled case moves to affirm on the grounds that it is manifest that the question presented is so unsubstantial as not to need further argument.

VINCENT A. THEISEN,
1118 Wilmington Trust Building,
Wilmington, Delaware,
Attorney for Appellee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 307

MABEL V. ROMAN, Clerk of the Peace for New Castle County; WALTER A. HANDSBERRY, Clerk of the Peace for Kent County; I. ROBERT WILLEY, Clerk of the Peace for Sussex County; *et als., Appellants,*

v.

RICHARD SINCOCK, *et als,*

Appeal from the United States District Court for the District of Delaware

MOTION TO ADVANCE
AND
BRIEF IN OPPOSITION TO THE MOTION TO AFFIRM

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 307

MABEL V. ROMAN, Clerk of the Peace for New Castle County; WALTER A. HANDSBERRY, Clerk of the Peace for Kent County; I. ROBERT WILLEY, Clerk of the Peace for Sussex County; *et als., Appellants,*

v.

RICHARD SINCOCK, *et als.*

Appeal from the United States District Court for the District of Delaware

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MOTION TO ADVANCE
AND
BRIEF IN OPPOSITION TO THE MOTION TO AFFIRM

Appellants move the Court, pursuant to Rule 43(4), to advance the hearing of the above-entitled cause so that it may be heard immediately following *W.M.C.A. Inc.* v. *Simon*, No. 20; *Reynolds* v. *Sims*, No. 23; *Vann* v. *Frink*, No. 27; *Maryland Committee &c.* v. *Tawes*, No. 29; *McConnell* v. *Frink*, No. 41; and *Davis* v. *Mann*, No. 69, in

all of which probable jurisdiction was noted on June 10, 1963.

The grounds for this motion sufficiently appear in Appellants' Brief in Opposition to the Motion to Affirm, which follows:

First. The thrust of the argument in the 25-page brief supporting the motion to affirm is that the issue primarily emphasized in our Jurisdictional Statement, whether area apportionment of the upper house of a State Legislature violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, is not even in the case (Br. 2, 12-13, 14-18, 22).

In view of the decree and injunction of the court below, that argument is demonstrably untenable.

The decree (J.S. App. A68) declares invalid and unconstitutional the 1963 amendment to the Delaware Constitution, under which each county in Delaware became entitled to 7 senators (Sections 1-4; J.S. App. A78-A79). Moreover, the injunction below (J.S. App. A69-A70) would, had it not been stayed by the Circuit Justice, have prevented any elections to fill vacancies in the Senate, inasmuch as it enjoined all elections to all of the General Assembly under the 1897 constitution as well as under the 1963 amendment thereto.

Plainly, therefore, the issue of area apportionment of the upper house of a State legislature is inescapably in this case. Other issues are present too, but those are adequately set forth in our Jurisdictional Statement and need not be further discussed here.

Second. If a more detailed exposition of the presence of the Senate apportionment issue herein is deemed necessary, it can easily be provided.

Two judges below held violative of the Equal Protection Clause any apportionment of a State senate that did not

give major weight to population, Judge Biggs (J. S. App. A42-A50) giving his reasons for so holding at some length. Judge Wright concurred, saying (J. S. App. A62-A63):

> "I agree with my Brother Biggs' precatory observation that the Senate must be based substantially on population. But all other factors accepted in the majority opinion as justification for deviation from the population principle may be invoked so long as the majority principle is adhered to."

The foregoing concurrence in Judge Biggs' views constitutes, very plainly, a majority of the court below in support of the proposition that any apportionment of a State senate that does not give primary weight to the population factor offends the Equal Protection Clause. Accordingly, under that holding, any plan that reapportioned the Delaware Senate on the basis of equal representation for each of the State's three counties would be unconstitutional, even though the population of every senatorial district within each county were mathematically identical with the population of every other senatorial district in the same county.

Judge Layton, the third member of the court below, dissented as to the State senate (J. S. App. A63-A67), and concurred in the result on a narrow ground (J. S. App. A67):

> "* * * I concur in the result reached by the majority in holding that the State Senate as created by the 1963 Amendment to Art. 2 Sec. 2 of the Constitution must fall but upon the single ground that the Amendment, containing no severability clause, the entire Act must fall."

But this, very plainly, was a dissent; it was in no sense the holding of the district court. For the majority of the court did not rest their views on any principles of non-separability.

Our reading of what was actually held by the court below has the weighty concurrence of the Circuit Justice, who, overruling that court, stayed the operation of its injunction. He said (letter to counsel, June 27, 1963):

> "There are a number of cases now pending before the Court to be argued in November which involve issues substantially the same as those to be presented in this case. • • •"

The Circuit Justice's analysis of the present case is even more significant in view of the contention made before him by the appellees, at p. 27 of their 42-page "Answer of Plaintiffs in Opposition to the Application for a Stay Pending Appeal," that "the adjudication of the Court below can be made to rest on findings other than its determination as to the validity of the apportionment of the senate."

But we are dealing with substance, not with debating points.

The fallacy of appellees' contention that area apportionment of the Delaware Senate is not an issue in the present case is two-fold:

One, appellees' contention finds the holding of the court below in Judge Layton's dissent, an obvious misreading of the several opinions.

Two, appellees refuse to face up to the circumstance that, on the basis of the holding below declaring area apportionment of a State senate to be offensive to the Federal Constitution, no plan of redistricting within a county, even one completely equalizing with absolute mathematical exactitude the districts within each county, could ever pass muster under the district court's interpretation of the Equal Protection Clause.

In short, appellees' motion to affirm asks this Court to rule that the indispensable guideline laid down by the court below for any future reapportionment of the Dela-

ware Senate is not in this case at all. We submit that this dominant guideline, which necessarily will have great influence on the future structure of Delaware's government unless this Court intervenes, cannot be wished out of this case simply because appellees are, understandably enough, reluctant to defend in its entirety the district court's Design for Delaware.

Third. The circumstances that this basic issue of area representation for State senates has already been set for argument here, in the six cases noted above which reached divergent results below, and that the same issue is still being decided with varying answers elsewhere (e.g., *Caesar* v. *Williams*, 371 P. 2d 241 (Idaho); *Sweeney* v. *Notte*, 183 A. 2d 296 (R. I.); *Nolan* v. *Rhodes*, 31 U.S. Law Week 2641 (S.D. Ohio); *Moss* v. *Burkhart*, 32 U.S. Law Week 2077 (W.D. Okla.); *Lisco* v. *Love*, 32 U.S. Law Week 2076 (D. Colo.); *Meyers* v. *Thigpen*, 211 F. Supp. 826 (W.D. Wash.), pending on appeal, No. 381; *Sobel* v. *Adams*, 214 F. Supp. 811 (S.D. Fla.), pending on appeal *sub nom. Swann* v. *Adams*, No. 297), sufficiently demonstrate the substantiality of that issue, without further argument or even additional comment.

Fourth. We urge again that this Court set down the present case for argument with the other cases involving area apportionment of State senates, because this appeal adduces materials for decision, not presented or even mentioned in any of the other pending cases, that should be weighed and fully considered before any guidelines for or generalizations concerning the constitutional requirements for the composition of State senates are formulated.

One. We urge that this Court weigh carefully the unique history of Delaware, the first State to ratify the Constitution of the United States, lest it make sweeping pronouncements regarding the relationships of States and their counties, that, however, correctly they may set forth the devolution and development of the other States of the Union, would be plainly erroneous in the case of Delaware.

A typical such pronouncement underlies the currently held assumption of numerous practitioners of political science that the Federal analogy of equal representation in the United States Senate is inherently inapplicable, and hence unconstitutional, when followed in the governmental structures of the several States. See, e.g., *One Man—One Vote* (The Twentieth Century Fund, 1962) 9, where it is said: "Thus the Senate was a condition of union among a group of states which the Federal Government created by that union has no power to destroy. Counties, by contrast, were never independent or sovereign. They did not create the states but were created by them."

This facile generalization is demonstrably untrue of Delaware. There, as we have shown, somewhat summarily (J.S. 18-19), the counties *were* sovereign, and did create the State. Prior to the Declaration of Independence, the Three Lower Counties upon Delaware were a semi-autonomous part of Pennsylvania. Thus, the enacting clause of legislation just before the Revolution read as follows (1 *Laws of the State of Delaware* [1797] 564, Act of March 29, 1775):

> "Be it enacted by the honorable John Penn esq. with his Majesty's royal approbation, Governor and Commander in Chief of the counties of New-Castle, Kent, and Sussex, upon Delaware, and province of Pennsylvania, by and with the advice and consent of the Representatives of the freemen of the said counties in General Assembly met, and by authority of the same—"

It was not until a Convention met at New Castle in August 1776, "in pursuance of a recommendation of the House of Assembly, made at a session thereof in July last", that, on September 20, 1776, a Constitution was adopted, whose first article (1 Thorpe, *The Federal and State Constitutions* [H.R. Doc. 357, 59th Cong., 2d sess.] 562) provided that—

> "The government of the counties of New-Castle, Kent and Sussex, upon Delaware, shall hereafter in

all public and other writings be called, *The Delaware State.*"

Until then, there was no Delaware State; until then, as contemporaneous writings, including the Adams and Jefferson papers, show, there were only the Lower Counties. See J.S. 14-15; 2 *Diary and Autobiography of John Adams* (Butterfield ed. 1961) 114, 121, 189, 190, 193, 204, 206, 207; 1 *The Papers of Thomas Jefferson* (Boyd ed.) 182, 310, 311, 314.

Consequently, to generalize that "Counties, by contrast, were never independent or sovereign" is simply to demonstrate once again the inherent fallibility of generalizations.

Two. Up to now, no other case has presented or considered, in arguing or construing the Equal Protection Clause in the present connection, the views of those who first construed that Clause when engaged in scrutinizing the new constitutions of the former Confederate States prior to readmitting them to the Union. We have shown that, in 1868, after Congress had imposed as condition precedent to reentry into the Union the requirement that States seeking readmission ratify the Fourteenth Amendment, it readmitted two States whose new constitutions provided schemes of Senate reapportionment based solely on counties. Those Congressional views, duly expressed on the statute book, constitute a contemporaneous exercise of the power of Congress to enforce the Fourteenth Amendment under Section 5 of that Amendment, and accordingly constitute peculiarly meaningful testimony as to its meaning. See J. S. 24-28, which summarizes succinctly a portion, but only a portion, of the available materials.

We recognize, of course, that Congressional views of the scope of the Equal Protection Clause enacted into law in 1868 do not necessarily fix its meaning irrevocably for the future, however much those views emphasize how drastically the holding of the majority of the court below undertook to amend that Clause. But, as this Court has thrice

said, "We do not write upon a clean slate." *Abbate* v. *United States*, 359 U.S. 187, 190; *Lee v. Madigan*, 358 U.S. 228, 232; *Green* v. *United States*, 356 U.S. 165, 187. At a very minimum, therefore, the Court should not undertake to construe the Equal Protection Clause in an area of entirely novel judicial impression—the present point was expressly reserved in *Gray* v. *Sanders*, 372 U.S. 368, 376—without the fullest consideration of all of the available contemporaneous materials. As we say, none of these has been heretofore presented, much less evaluated; and assuredly this aspect of the Equal Protection Clause cannot be appropriately considered simply as a matter of fiat resting on individualized views of what may seem most desirable as a matter of governmental structure or policy.

Fifth. We had earlier urged (J.S. 29) that this case "should be set down for argument with, or very shortly after, the other reapportionment cases involving the composition of State senates."

For it is far less difficult to arrive at a correct conclusion in the first instance, even in the most baffling situations, after considering all of the relevant materials, than it is to formulate a conclusion after study of only some of the materials, and then to be required to amend, to modify, to qualify, perhaps indeed to withdraw portions or passages of what was first proclaimed with full assurance of its soundness.

We are prepared to file our brief by November 9, before the arguments in the other cases involving area representation in State senates are now scheduled to commence. This would enable the appellees herein to be fully apprised of our views several days before argument in this case could be heard, so that their brief would be ready for the argument. If deemed necessary in order to meet this accelerated schedule, we would, if required by the Court, waive any further reply; or, alternatively, we would file our reply brief within a few days after the argument. In any event,

since the Appendices to our Jurisdictional Statement contain all of the opinions below, the last of which includes the findings of fact and conclusions of law, the bulk of the materials for decision is already in print. The complaint with amendments and the pretrial order could easily be printed while the briefs are being prepared. The balance of the record designated by the parties could then be made available in printed form soon after argument.

CONCLUSION

For the reasons set forth above, we respectfully submit that probable jurisdiction of the present appeal should be noted, and that this motion to advance should be granted.

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SEPTEMBER 1963.

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No. 307.

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Appellants,

v.

RICHARD SINCOCK, et als.

Appeal From the United States District Court for the District of Delaware.

STATEMENT OF APPELLEES WITH RESPECT TO APPELLANTS' MOTION TO ADVANCE.

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Appellants,

v.

RICHARD SINCOCK, ET ALS.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

STATEMENT OF APPELLEES WITH RESPECT TO APPELLANTS' MOTION TO ADVANCE.

This statement is submitted in response to the Appellants' Motion to Advance made under Rule 43(a).

The Appellees have filed, heretofore a Motion to Affirm the decision of the Court below. That motion is now pending.

We respectfully submit that there is nothing sweeping or unique in the Delaware case and no impelling reason exists for giving it the extraordinary consideration suggested by the Appellants.

The Court below had before it two apportionment schemes. Neither Article II, Section 2, nor the Amendment of 1963, met the minimum standards set by the vast majority of Courts which have considered such action. (See Appellees' Brief in Support of Motion to Affirm, pp. 2, 16-17.) The District Court did not have before it an apportionment scheme where one house was based on population. It therefore made no ruling that, where one house is based upon population, area apportionment of the upper house of a state legislature violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. That issue—notwithstanding the appellants' struggle to interject the same into the case on appeal—was not decided by the Court below.

The Court's holding appears at A41-42 as follows:

> "Putting the matter plainly the apportionment of Section 2 of Article II, new or old, is capricious, arbitrary, and invidiously discriminatory when viewed in the year 1963. In apportioning the House of Representatives the basis must be one of population. 'One vote, One person' must be the aim. Gray v. Sanders, — U. S. — (1963)."

The concurring opinion of Judge Wright (A62) states agreement with Judges Biggs and Layton insofar as Article II Section 2, new or old, are held invidiously discriminatory because of gross population disparities. Insofar as the Senate is concerned, Judge Wright expressed agreement with Judge Biggs' *precatory observations.* The opinion of Judge Layton, of course, expressly limits his holding. Thus, the contention of appellants that the opinions have been misread is in error (Appellants' Brief, p. 4).

The appellants therefore urge that this motion to affirm be granted.

If this Court were not to affirm the decision below and were to enter an order noting probable jurisdiction, the

appellees will of course comply with any schedule that this Court believes would be of help in resolving any issues that might remain after argument in *W. M. C. A. Inc. v. Simon*, No. 20; *Reynolds v. Sims*, No. 23; *Vann v. Frink*, No. 27; *Maryland Committee &c. v. Tawes*, No. 29; *McConnell v. Frink*, No. 41; and *Davis v. Mann*, No. 69.

The appellees further will stand ready to argue the issues at such time as the Court may prescribe.

CONCLUSION.

The appellees respectfully ask this Court to affirm the decision below. If, however, probable jurisdiction is noted, they will extend themselves in any way this Court suggests so that they may have a speedy restoration of the rights guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

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September 25, 1963.

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BRIEF FOR THE APPELLANTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 307

MABEL V. ROMAN, Clerk of the Peace for New Castle County; WALTER A. HANDSBERRY, Clerk of the Peace for Kent County; I. ROBERT WILLEY, Clerk of the Peace for Sussex County; *et als., Appellants,*

v.

RICHARD SINCOCK, *et als.*

On Appeal from the United States District Court for the District of Delaware

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the district court granting a limited stay (J.S. App. A1-A6)[1] is reported at 207 F. Supp. 205. The

[1] In view of the order of the Court directing that the parties proceed on the unprinted record, we use the following designations:

"J.S. App." refers to the Appendices to the Jurisdictional Statement.

"Del. App." refers to the record appendix printed by the appellants.

"PTO" refers to the Pretrial Order in this case.

"Tr." refers to the typewritten transcript of evidence at the trial.

"M/A" refers to Brief of Appellees in Support of their Motion to Affirm the Decision of the District Court.

opinion of the district court denying appellees' motion for a preliminary injunction and denying appellants' motion for a further stay (J.S. App. A8-A16) is reported at 210 F. Supp. 396. The opinion of the district court holding unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States the apportionment provisions of the Delaware Constitution of 1897 as well as the apportionment amendment to the Delaware Constitution adopted in 1963, together with the concurring and dissenting opinions delivered there (J.S. App. A16-A67), are reported at 215 F. Supp. 169.

The opinion of the Supreme Court of Delaware holding that the 1963 amendment became effective on January 17, 1963, is reported *sub nom. Opinion of the Justices*, 190 A. 2d 519. The opinion of the Supreme Court of Delaware holding that the Governor of Delaware must obey the mandate of the 1963 amendment notwithstanding the decision below in this case (Del. App. 1a-5a) has not yet been reported.

JURISDICTION

(a) The final decree of the district court (J.S. App. A68), declaring unconstitutional under the Fourteenth Amendment both the apportionment provisions of the Delaware Constitution of 1897 and of the 1963 amendment to that Constitution, was entered on April 30, 1963. The notice of appeal from the final decree was filed in the district court on May 28, 1963.

(b) The injunction of the district court (J.S. App. A69-A70), enjoining the holding of any elections for members of the Delaware General Assembly under both of the foregoing provisions of the Delaware Constitution, was entered on May 20, 1963, on the district court's own motion, without notice or hearing. A motion to stay that injunction pending appeal was denied by the district court on June 10, 1963. The notice of appeal from the injunction and from

denial of the motion to stay was filed in the district court on June 12, 1963.

(c) On June 27, 1963, Mr. Justice Brennan stayed the foregoing injunction "pending the perfection of the appeals and the final disposition of such appeals by this Court."

(d) Pursuant to this Court's Rule 15(3), both appeals were treated as a single case, which was filed here on July 25, 1963. Probable jurisdiction was noted on October 21, 1963, in an order directing that the printing of the record be dispensed with.

(e) The jurisdiction of this Court rests on 28 U.S.C. §§ 1253 and 2101(b).

QUESTIONS PRESENTED

1. Does the Fourteenth Amendment to the Constitution of the United States preclude the State of Delaware from employing the Federal system of a House of Representatives based on population and a Senate based on equal representation for each county in constituting the General Assembly of the State?

2. Did the court below err in entering a blanket injunction restraining the holding of any election pertaining to the members of the General Assembly under the apportionment provisions of the Delaware Constitution, both before and after the 1963 amendment thereto, on the ground that such constitutional provisions, which provided among other things for area representation in the Delaware Senate, and that did not conform to the apportionment guidelines for the Delaware House of Representatives formulated by the court below, were in consequence of both reasons violative of the Fourteenth Amendment to the Constitution of the United States?

3. Does the apportionment of the membership of the Delaware House of Representatives effected by the 1963

amendment to the Delaware Constitution violate the Fourteenth Amendment to the Constitution of the United States?

4. Does the apportionment of the membership of the Delaware Senate effected by the 1963 amendment to the Delaware Constitution violate the Fourteenth Amendment to the Constitution of the United States?

5. Does the Fourteenth Amendment to the Constitution of the United States require the General Assembly of the State of Delaware to be reapportioned according to the precepts, standards, principles and guidelines set forth and discussed in the opinion of the court below dated April 17, 1963?

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the Constitution of the United States and of the Constitution of Delaware involved in this case are set forth at J.S. App. A71-A81.

STATEMENT

This was an action by one, Sincock, and six other individuals, now appellees here (and most generally referred to below simply as Sincock *et als.*), that sought to restrain the enforcement of the apportionment provisions of the Delaware Constitution of 1897 then in force, and asked in addition that the United States District Court for the District of Delaware reapportion the legislature of that State, brought against virtually every official of Delaware charged with responsibility for elections therein, including the Chancellor and the Judges of the Superior Court (who took no position on the merits of the case). While the action was pending, and under its impetus, two successive General Assemblies concurred in amending the State Constitution to effect a reapportionment.

Thereafter, the court below held unconstitutional under the Fourteenth Amendment both the apportionment pro-

vision of the 1897 Delaware Constitution as well as the amendment thereto effected in 1963; entered a decree to that effect; and later enjoined the holding of all elections to the General Assembly of Delaware under either constitutional provision. This injunction was thereafter stayed by the Circuit Justice; as will be pointed out below, pp. 104-105, the injunction and the decree together effectively preclude any amendment of the Delaware Constituton under either of the means prescribed by that instrument.

A. Delaware Apportionment When Suit Was Brought

Article II, Section 2, of the Delaware Constitution of 1897 (J.S. App. A71-A75), in force when the present action was commenced, divided the State into 17 Senatorial and 35 Representative Districts. Seven Senatorial Districts and ten Representative Districts each were assigned to Sussex County, to Kent County, and to rural New Castle County—"rural" in this connection means that portion of the latter county which excludes the City of Wilmington—while Wilmington was assigned two Senatorial and five Representative Districts (PTO, ¶¶C4-5). The debates in the 1897 Constitutional Convention show that this plan represented a compromise (PTO, ¶C10).

In 1897, the population of Delaware was about 180,000, of which Sussex County had 38,000, Kent County 32,000, and New Castle County 105,000 (of whom 70,000 were in Wilmington and 35,000 in rural New Castle County) (PTO, ¶C9).

By 1960, the population of Delaware had risen to 446,292, divided as follows: Sussex County, 73,195; Kent County, 65,651; New Castle County, 307,446 (Wilmington, 95,827; rural New Castle County, 211,619) (PTO, ¶C13). By 1960, also, the population of the several Representative Districts varied from a low of 1,643 to a high of 58,228, while the Senatorial Districts ranged from 4,177 to 64,820 (PTO, ¶¶C14-17; J.S. App. A22-A27).

B. Initial Steps in Present Action; Delaware Constitution Amended

The present action was brought on June 5, 1962 (J.S. App. A14). It sought a declaration that the apportionment provisions of the Delaware Constitution of 1897 were unconstitutional; an injunction against the holding of any elections to the General Assembly; an order reapportioning the Representative and Senatorial Districts of Delaware according to population; or, alternatively, an order directing that the 1962 elections to the General Assembly be on an at-large basis.

On July 25, 1962, the court below stayed the proceedings until August 7. In its opinion (J.S. App. A4-A5), rendered before any evidence was heard, the district court emphasized the need for haste, saying:

> "It is not necessary to state here fully the exigencies presented by the election laws of Delaware, constitutional provisions aside. The primary election this year must be held on the third Saturday in August; viz., on Saturday, August 18, 1962. It is necessary for the duly authorized officers of the political parties to notify the Department of Elections of the need for a primary election by the first Saturday in August; i.e., by Saturday, August 4, 1962. Publication of the time and places for holding primary elections must be made at least five days prior to the time the primary election is to be held; i.e., probably as a practical matter by Saturday, August 11, 1962. If the Constitution is to be amended publication of the proposed amendment must be made by August 6, 1962. The sum of the foregoing is that definite and positive action should be taken by the present General Assembly prior to August 4, 1962, and must be taken by the present General Assembly no later than August 5, 1962, or nothing constructive can be accomplished, at least through the means of the legislative branch of our State Government without months if not years of futile delay; in all probability not until after the general election of 1966.

> "We point out what we are sure will be obvious to the electors of this State that insofar as members of the General Assembly are concerned, if there is no valid primary election there can be no valid general election. Without a valid election law there can be no *de jure* elections either primary or general, insofar as membership in the General Assembly is concerned. Finally, and perhaps at the risk of needless repetition, we reiterate that if the apportionment provisions of Section 2 of Article 2 are held invalid, we can perceive difficulty in convening a *de jure* legislature. Without a *de jure* General Assembly it is difficult to perceive how valid legislative acts can be enacted. The unpleasant results would be far reaching."

The court below also suggested that the Delaware General Assembly amend the State Constitution so that apportionment would thereafter be regulated by statute rather than by constitutional provision, saying (J.S. App. A4):

> "Such an Amendment and such an Act would not only preserve the legislative system of Delaware and the rights of its electors while a permanent effective constitutional provision relating to apportionment could be worked out, but would also afford the State through its elected representatives the opportunity to pass a new apportionment act without undue delay in the event this or another court should declare the initial legislative apportionment statute enacted under such proposal not to be in conformity with the equal protection clause of the 14th Amendment.
>
> "Whether or not such a plan as outlined above is feasible and merits either consideration or adoption is exclusively within the province of the General Assembly."

Meanwhile, the Governor of Delaware had appointed a Bipartisan Reapportionment Committee (Del. App. 52a), around July 5, 1962 (Del. App. 92a-93a), which held a series of meetings from July 12 to 23, at the end of which time it presented its report (Del. App. 54a-58a, 63a-65a). See Del. App. 66a-68a, 73a-77a, 83a-88a, 90a-91a, for reasons

underlying its recommendations, and Def. Ex. 1 (Del. App. 100a-339a) for a record of its hearings. The chairman of that Committee testified (Del. App. 88a):

> "We felt this Court had a gun at the back of the General Assembly of Delaware, and we had better apportion the House of Representatives on a population basis under Baker versus Carr, and as fast as we could."

The portion of the Committee's report that dealt with an immediate plan of reapportionment became House Bill 574 to amend the State Constitution (Del. App. 93a-94a) and was duly passed (Del. App. 94a-95a), while another portion, which proposed to speed up the Constitutional provisions for the calling of a Constitutional Convention, failed to muster the required two-thirds majority (Del. App. 94a-95a). House Bill 574 contained a provision, inserted by way of compromise, which left unchanged the representation formula prescribed by the existing Constitution for the composition of a Constitutional Convention (Del. App. 95a, 96a-97a; see Sec. 2B, J.S. App. A81).

Thereafter, in conformity with the provisions of Art. XVI, Sec. 1, of the Delaware Constitution (J.S. App. A76), the next General Assembly sitting after a general election had intervened again passed the reapportionment measure as House Bill 3, which became effective on January 17, 1963 (*Opinion of the Justices*, 190 A.2d 519). It is set out at J.S. App. A77-A81.

Briefly, the 1963 reapportionment adds one representative to each of two Representative Districts in Wilmington, one representative to one such District in rural New Castle County, two representatives to two such Districts, and three representatives to another. It made no changes in either Kent or Sussex Counties, so that the net result was to add 10 representatives from New Castle County to the lower house (PTO, ¶¶C21-22).

In the Senate, the amendment results in following the Federal pattern more closely, by giving each County seven

senators; the additional members for Kent and Sussex are to be elected at large after dividing each county so that their eastern and western portions each elect one additional senator (PTO, ¶¶C23, 26).

The effect of the amendment on the population of the several Representative and Senatorial Districts is set out at J.S. App. A31-A35.

The reasons underlying the 1963 reapportionment appear in the record as follows:

On the suggestion of a Wilmington member, the Committee decided to follow the Federal analogy (Del. App. 85a).

Accordingly, it was decided to retain a bicameral legislature with the Senate on a county basis, while Kent and Sussex were divided on an east-west basis to obtain two more floterial Senators from each without disturbing historical and traditional Senatorial Districts (Del. App. 83a, 85a-86a).

The House was reapportioned on a population basis (Del. App. 83a), with each existing Representative District retaining one representative, and with a reapportionment every 10 years (Del. App. 67a-68a). After considering various figures (Del. App. 67a-75a, 84a-85a), the Committee decided on 15,000 or a major fraction thereof as the limit of each Representative District, based on trends in population growth, the small size of the State, accommodations for the General Assembly, and in order to give a voice to all segments of society and to all practices and customs (Del. App. 73a-76a). In leaving at least one Representative to each existing Representative District, the Committee proceeded on the basis that, considering population trends, all Districts would soon grow to reach a major fraction of 15,000 (Del. App. 75a, 91a-92a).

C. Further Motions; Trial

The defendant election officials' motions to dismiss were denied while the 121st General Assembly was in session, the court saying, among other things (J.S. App. A8):

> "We wish to make it plain that we have no desire to substitute our judgment for the collective wisdom of the General Assembly of Delaware whose primary duty it is to assure the electors of this State apportionment provisions to meet the test laid down by the Supreme Court of the United States in Baker v. Carr, but in the light of all the circumstances we have no alternative but to proceed promptly."

Thereafter, following the passage on July 30, 1962, by the 121st General Assembly of House Bill 574, all the election officials on August 7 moved for a further stay to enable the 122nd General Assembly, coming into office on January 8, 1963, to be given the opportunity to concur therein and to make it effective as an amendment to the State Constitution.

Sincock *et als.* countered by asking a preliminary injunction to restrain the general election scheduled for November 1962, and by amending the prayers of their complaint to ask that the court declare the then proposed reapportionment amendment to the Delaware Constitution invalid on the same grounds as the original provision that it superseded.

Their amended complaint further prayed that the court provisionally reapportion the General Assembly of the State of Delaware.

The district court denied the motion for the preliminary injunction and likewise denied the motion for a stay (J.S. App. A8-A16), saying at A15-A16:

> "We regret that the 121st General Assembly did not see fit to adopt the suggestion 'as a temporary haven,

and not as an ultimate harbor'* made by us, that the embodiment of apportionment provisions be striken out of the Constitution of Delaware by an amendment to Section 2 of Article II that would prescribe that the composition of the Senate and the House of Representatives of the General Assembly and the terms of office of its members in the future should be as provided by Act of the General Assembly; i. e., provided by statute and not by constitutional provisions. Had the General Assembly pursued the course suggested and proposed such an amendment the 122nd General Assembly would have been able to adopt it. If an apportionment statute, not meeting the standards of the Fourteenth Amendment, had then been enacted by the General Assembly, no further amendment to the Constitution of Delaware would have become necessary. Another statute satisfying the guarantees of the Fourteenth Amendment could simply have been passed. As things stand now, if Section 2 of Article II and the provisions of H.B. 574 be held unconstitutional, no new plan for the composition of the Senate and House of Representatives can be effected under the provisions of Section 1 of Article XVI by a General Assembly until 1965. This in effect leaves this court in a position where it must proceed promptly to adjudicate the merits of the controversy after full hearing."

Thereafter, following the formulation of a lengthy pretrial order, the trial began.

At the trial, Sincock *et als.* called only two witnesses:

One, Dr. Paul Dolan, Professor of Political Science at the University of Delaware (Tr. 29), expressed his belief (Tr. 34) "that the general axiom of one man, one vote should prevail"; that (Tr. 104) population should be the sole factor in any apportionment; that (Tr. 122) a unicameral legislature was best; and that (Tr. 141) Delaware did not need a bicameral legislature.

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* [Note in original: "See 207 F. Supp. at pp. 206-207."]

The other, Dr. Royce Hanson, Associate Professor of Government and Public Administration at American University (Tr. 147-148), is the President of the appellant Committee in the Maryland reapportionment case here, *Maryland Committee on Fair Representation* v. *Tawes*, No. 29, this Term (Tr. 149-150), in which he seeks judicial approval for some of the views to which he testified, and in which he is intensely interested (Tr. 229-230).

The Delaware election officials called Dr. James K. Pollock, Murfin Professor of Political Science at the University of Michigan (Tr. 328-329), who served as a member of the recent Constitutional Convention in Michigan (Tr. 331-332).

Briefly, Professor Pollock gave more weight to non-population factors in reapportionment, such as sectional interests, social and economic factors, natural resources, tradition, and history, than did the witnesses for Sincock *et als.* (Tr. 333-339, 342, 370-371, 376, 383-384).

In our view, however, exposition in detail of the conflicting views of these three professors of political science would serve no purpose here, not only because one of them is an interested party in a related case, but primarily because those views go simply to the wisdom and desirability of different plans for arranging state legislatures. Moreover, most of what the professors said bears out the presiding judge's comment that "it is ceasing to be testimony and becoming a very interesting lecture in electoral machinery" (Tr. 434). Their aggregate "evidence", including colloquies, extends over nearly three-quarters of the transcript.

During the trial, the several professors were asked to comment on a reapportionment plan for the Delaware House of Representatives devised by the court (Court Ex. 4, Del. App. 98a-99a; Tr. 144-147, 168-169, 171-174, 207, 376-378), a plan which was shown to contain at least one arithmetical error (Tr. 704). The record suggests

that this was originally a confidential document (Tr. 76-77). In fact it was presented to counsel by the presiding judge at the pretrial conference.

During the course of the trial, Sincock *et als.* proposed a reapportionment plan of their own, based solely on population for both houses, which provided for some at-large elections (Pl. Ex. 17-21; Tr. 210-226, 232-234, 296-301, 307-308, 314-316). Thereafter, following a discussion in which plaintiffs called attention to their prayer that the district court reapportion the Delaware legislature (Tr. 303-318), plaintiffs hastily rewrote their plan (Pl. Ex. 24-36; Tr. 664-665, 698, 703), at meetings at which one of the State's major political parties was unrepresented (Tr. 697, 707-709).

Throughout the trial, the presiding judge emphasized that "The terrible problem here is one of time." (Tr. 357), repeating his expression about "a box of time" (Tr. 607, 608-609). Towards the close of the hearings, he indicated that the district court might have to draw up a reapportionment plan of its own (Tr. 737).

D. Counties in Delaware History and Law

Under Point I, pp. 33-53, below, we document extensively the process whereby the Three Lower Counties of New Castle, Kent, and Sussex, upon Delaware, became, in September 1776, The Delaware State.

At this juncture it is sufficient simply to summarize what is shown by the documents and amplified by the testimony (Del. App. 12a-50a) of the State Archivist, Mr. Leon de Valinger, Jr., a recognized authority on Delaware history, and editor, *inter alia*, of the *Court Records of Kent County, Delaware, 1680-1705.*

Two of the counties started as judicial districts created by the Dutch prior to 1673, the third was created by the

Duke of York in 1680. Under Penn, the governmental powers and functions of the three counties were substantially expanded.

Originally, the Three Lower Counties upon Delaware, known also as the Territories, shared representation with the other counties of Pennsylvania, known as the Province, in an Assembly in which each county had equal county representation.

Penn's Charter of Liberties of 1701 permitted within three years "a distinct Assembly for the Territories," and, after 1704, the Delaware counties had a separate Assembly, again with equal county representation, but with the same governor or lieutenant governor as the Province.

In 1745, Lord Mansfield, then Attorney General Sir William Murray, doubted the legal authority of this "distinct Assembly," none of whose laws were ever in fact submitted to the British crown for approval.

Contemporaneous references to the area in question, in the Journals of the Continental Congress and in the letters and papers of its members, as—in variant forms—"the Three Lower Counties *on* (or *upon*) Delaware," but never as counties *of* Delaware, indicate that they were not regarded by contemporaries as forming a unitary body.

In June 1776 the Assembly for the Counties of Newcastle, Kent, and Sussex, upon Delaware, severed all ties with the Crown. At that point sovereignty resided in each of the counties (Del. App. 19a-20a), and there was no executive, save as the Speaker of the Assembly, or the President of the Convention that met in August 1776, may have functioned as such. During this interim period, from June to September 1776, some or all of the three Counties on Delaware could have joined Pennsylvania or Maryland or formed separate States (Tr. 287, quoted below at p. 48, note 8; Del. App. 28a).

Finally, on September 20, 1776, the Convention, in which each County had ten delegates adopted a Constitution whose first article provided that—

> "The government of the counties of New-Castle, Kent and Sussex, upon Delaware, shall hereafter in all public and other writings be called, *The Delaware State.*"

At this point, Delaware for the first time became a formal political unit, and for the first time acquired an authoritatively established name. It is only after this date that the Journals of the Continental Congress refer to "Delaware State."

Through successive Constitutions—1776, 1792, and 1831—the three counties were equally represented in the State legislature, each with three members in the upper house, called first the Council and then the Senate, and each having seven representatives in the lower house, called first the House of Assembly and then the House of Representatives. See Del. Const. 1776, Arts. 3 and 4 (1 Thorpe, *The Federal and State Constitutions* (H. R. Doc. 357, 59th Cong., 2d sess.) 562);[2] Del. Const. 1792, Art. II, §§2, 3 (1 Thorpe 568, 570-571); Del. Const. 1831, Art. II, §§2, 3 (1 Thorpe 582, 584-585).

Not until the Constitutional Convention of 1852 was consideration given to increased representation for the City of Wilmington, and then the draft Constitution so providing was rejected by the people of Delaware. (Del. App. 25a, 39a); for its terms, see *Debates and Proceedings of the Constitutional Convention of the State of Delaware* (Dover,

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[2] Hereinafter cited simply as "Thorpe". The pagination of the seven volumes of this work is consecutive, but in the interest of convenience, the volume number will be indicated in every instance.

1853) 302-313.[3] It was 1897 before any Delaware Constitution deviated from the pattern of equal legislative representation for each county (*supra*, p. 5). Similarly, it was 1897 before any legislative representatives were elected from districts rather than at large from each county (Del. App. 37a, 50a).[4]

Counties have continued to be strong governmental units since the formation of the State in September 1776 (PTO, ¶¶C46-48). Under the statutes of the State, many of which are very old, Delaware counties exercise many functions; the listing that follows is from the final opinion of the district court (J.S. App. A39):

> "Pursuant to state statutes, the counties, *qua* county, exercise the following legislative functions or rights: (a) to assess and levy, collect and receive taxes, 9 Del. C.Ann. § 8601, et seq; (b) to appropriate and borrow money, 9 Del.C.Ann. §§ 4111, 4131, 4133, 1522, 1561; 1563, 6111, 6131, 6132, 6205; (c) to establish pension plans for employees, 9 Del.C.Ann. § 1701, et seq; (d) to appropriate money for the indigent sick, 9 Del.C.Ann. §§ 1801, 4201, 6205; (e) to appropriate money for welfare purposes, 9 Del.C.Ann. § 1521 and 31 Del.C.Ann. §§ 329 and 513; (f) in New Castle County to designate firemen and policemen, 9 Del.C.Ann. § 1903; (g) to provide an ambulance and rescue service, 9 Del.C.Ann. § 2001; (h) to supervise street and highway lighting if the taxable people within the area petition it, in which event the Levy Court acts as a holding company to make the proper contract, 9 Del.C.Ann. § 2101; (i) general supervision over sidewalks, fire hydrants, water mains, sanitary and drainage sewers, when fifty per

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[3] Interestingly enough, the member of this Convention who represented Pencader Hundred of New Castle County, Benjamin T. Biggs (see *Debates and Proceedings*, *supra*, at 318), was the grandfather of the judge who presided in the district court in this case.

[4] The President of the 1897 Convention, John Biggs (1 Del. Code Ann. [1953] 350), was the father of the presiding judge in this case.

cent or more of the taxable people in a certain area petition that this be done, 9 Del.C.Ann. § 503; (j) to control garbage refuse collection and disposal thereof, 9 Del.C.Ann. § 2401; (k) as to New Castle County, jurisdiction with respect to planning and zoning, 9 Del.C.Ann. § 2601; (l) certain jurisdictional authority with respect to parks and recreation, 9 Del.C.Ann. §§ 610 and 616; and (m) the Register of Wills, Prothonotary, Sheriff, Coroner and Recorder of Deeds carry out the general state laws under the respective county governments, 9 Del.C.Ann. §9101 et seq., § 9502 et seq., § 9603 et seq..

"In colonial days the Levy Courts had the power to administer alms houses, and were until 1935 overseers of roads. They also had the power to tax but did not make the general laws."

E. Opinion, Decree and Injunction Below

In a lengthy opinion (J.S. App. A16-A62), the district court held unconstitutional under the Fourteenth Amendment both the reapportionment provisions of the Delaware Constitution of 1897 and the reapportionment amendment effected in 1963, on the ground that neither plan had a rational or a reasonable basis. The court held that a variation between districts of 1 to 1½ represented the maximum population variance allowable under the Fourteenth Amendment to the Constitution of the United States, and, further, that the Equal Protection Clause required both houses of a State legislature to be apportioned according to population. Judge Biggs again emphasized the time element (J.S. App. A55): "The State of Delaware, the General Assembly, and this court all seem to be trapped in a kind of box of time. The exigencies of the calendar and the oncoming general election of 1964 confront us."

Judge Layton, while concurring as to the House reapportionment, dissented as to the Senate, holding that area representation in one house is perfectly constitutional. However, he concurred in the result, on the ground that

the 1963 amendment, which reapportioned both branches of the Delaware Legislature, contained no separability clause. J.S. App. A63-A67.

The court accordingly entered a final decree, holding unconstitutional both Delaware Constitutional apportionment provisions (J.S. App. A68).

Following the district court's decision, but before its decree had been entered, the Governor of Delaware requested an opinion from the Supreme Court of the State as to the effect of that decision on his obligation to effect a reapportionment pursuant to the terms of the 1963 amendment. The Supreme Court advised that the district court's decree was subject to appeal, that no injunction had been issued and that the governor was not a party to the cause, and that he was in consequence bound to reapportion, though his proclamation should as a matter of deference to the district court refer to its determination. *Opinion of the Justices*, May 6, 1963 (Del. App. 1a-5a). The Governor accordingly issued his reapportionment proclamation on May 17, duly reciting the district court's action (Del. App. 5a-10a).

The consequence was that the district court, three days later, on May 20, 1963, on its own motion and without any hearing, entered an injunction against the holding of any election whatever to the General Assembly either under the apportionment provision of the Delaware Constitution of 1897 or under the apportionment amendment effective in 1963 (J.S. App. A69-A70). As will be shown below, pp. 104-105, this injunction effectively disables the State of Delaware from amending its Constitution by any of the methods prescribed therein.

A motion to stay that injunction pending appeal was denied by the district court on June 10, 1963, whereupon the Delaware election officials, asserting that the injunction was improvident and that the denial of the motion to stay

constituted an abuse of discretion, applied to the Circuit Justice. On June 27, 1963, Mr. Justice Brennan stayed the injunction "pending the perfection of the appeals and the final disposition of such appeals by this Court."

Notices of appeal from (a) the final decree, and (b) the injunction and the denial of the motion for a stay, were timely filed by all of the defendants except the Chancellor and the Judges. See this Court's Rule 46 (Summons and severance abolished).

The present appeal was docketed here on July 25. When Sincock *et al's.* moved to affirm, the Delaware election officials countered with a motion to advance.

On October 21, the Court noted probable jurisdiction, granted the motion to advance, and set the cause for argument on December 9 under an accelerated briefing schedule that dispensed with the printing of the record.

SUMMARY OF ARGUMENT

I. The assertion that the Federal pattern of area representation in one legislative house is unconstitutional when followed in a State legislature rests on the assumption that although the States created the United States, counties did not create States but were created by them.

That was not the case in Delaware. There the three counties on Delaware, after being deeded to William Penn, were by him united to his Province of Pennsylvania, and thereafter they shared representation in the Assembly of that Province. From 1704, the Three Lower Counties upon Delaware had "a distinct Assembly" in which each county was equally represented. The link of a common Governor or Lieutenant Governor bound them to the Province of Pennsylvania, but they had no council.

No law enacted by the Assembly of the Three Lower Counties was ever submitted to the Privy Council in Eng-

land for approval, and Attorney General Sir William Murray, afterwards Lord Mansfield, doubted in 1745 whether the legislative authority of that Assembly would "bear a strickt Examination."

"The Government of the Three Lower Counties of New-Castle, Kent, and Sussex, upon Delaware," with its seal reading "Counties on Delaware," was generally referred to by contemporaries in the first sessions of the Continental Congress as, in variant form, the Lower Counties *on* or *upon* Delaware. No references to the Counties *of* Delaware have been found.

On June 15, 1776, the Assembly of the Three Lower Counties divorced itself from the Crown, after which a Convention was called, in which each county was equally represented; that body on September 20, 1776, adopted a Constitution which declared that "The government of the counties of New-Castle, Kent and Sussex, upon Delaware, shall hereafter in all public and other writings be called, *The Delaware State.*"

From June 15 until September 20, 1776, such sovereignty as there was resided in the separate counties. There was no executive, save as the Speaker of the Assembly assumed ministerial functions of an executive nature—and even he was virtually superseded after the Convention met. Significantly, the experts for both parties at the trial agreed that, after June 15, 1776, some or all of the Three Lower Counties could have joined Pennsylvania, or Maryland, or formed separate States.

At that point, the Three Lower Counties were a loose confederacy of independent counties, just as the United States under the Articles of Confederation was a loose confederacy of sovereign States. But although the United States of America under the Articles of Confederation had an instrument of government and were a political unit, the Three Lower Counties had no charter, had only a doubtful

legislative authority (*vide* Lord Mansfield), and were not a formal political unit until they themselves created "The Delaware State."

Consequently the stock argument against modeling a State legislature on the Federal analogy fails utterly when sought to be applied to Delaware, where indeed the Federal pattern was anticipated. The result is that Delaware has perhaps the strongest claim of any State to erect its legislature on the Federal model.

The district court here did not contest the historical facts summarized above; it simply brushed aside any and all Delaware history that was inconsistent with its own blueprint for Delaware's future.

II.A. After the Reconstruction Acts of 1867 took effect, and every former Confederate State other than Tennessee was placed under military rule, the condition imposed by Congress for the readmission of those States was that each ratify the Fourteenth Amendment, which was then pending, and that each adopt a constitution consistent with the principles and conditions of that Amendment.

Five of those new constitutions provided for the apportionment of both legislative houses on the basis of population, though in one instance, Texas, the population discrepancies between senatorial districts thereunder were as high as 2.19 to 1.

In Florida, whose constitution did not specifically require both houses to be apportioned according to population, there was in fact room for large discrepancies. In Louisiana and Virginia, whose constitutions similarly contained no such specific requirement, the population discrepancies between senatorial districts were, respectively, 2.82 to 1 and 2.26 to 1.

Georgia's new constitution allotted one senator to each of three contiguous counties; this resulted in a maximum

disparity between senatorial districts of 5.7 to 1. Similarly, under South Carolina's new constitution, each county was given one senator, except Charleston County, which received two. Even so, the population discrepancies came to 5.2 to 1.

All of these new constitutions were laid before Congress, and were there examined and debated in detail. Georgia was denied readmission until she first excised two subdivisions from her constitution and, later, until she ratified the Fifteenth Amendment as well. Additional conditions were imposed on Virginia, Mississippi and Texas. While the four States last named were not readmitted until 1870, their legislative reapportionment provisions were in no sense responsible for the delay. The debates show meticulous scrutiny of the new constitutions, see *United States* v. *Florida*, 363 U.S. 121, but reveal not even the slightest intimation or at any time that any former Confederate State that set up its legislature on the Federal pattern was thereby denying to any person within its borders the equal protection of the laws.

This omission is the more striking because, when organizing new Territories, Congress in an unbroken pattern, from (at least) 1849 through 1868 invariably provided for bicameral legislatures, both houses of which were required to be apportioned according to population. Moreover, from 1864 to 1871, Congress was astute to provide for prompt reapportionment in the Territories and to disapprove and repeal any territorial act that appeared to effect an unfair reapportionment.

From this it follows that the Congresses nearest in time to the adoption, ratification, and initial enforcement of the Fourteenth Amendment interpreted the Equal Protection Clause as not prohibiting a State from constructing its legislature on the Federal pattern, and that the contrary

view of the court below, which is supported here by the United States as *amicus curiae*, represents a revelation never vouchsafed to the contemporaries of the framing and the initial implementation of the Fourteenth Amendment.

B. The circumstance that a minority of voters in Delaware can elect a majority of its senate no more condemns the State constitution so providing than the circumstance that 16.31% of the population of the United States can elect a majority of the United States Senate condemns the Constitution of the United States—whose Article V guarantees that this condition shall continue. Thus acceptance of the view of the court below, that Delaware violated the Equal Protection Clause when it followed the Federal model for its senate, involves the unacceptable paradox that the Constitution of the United States carries within itself the forever imbedded cancer of unconstitutional discrimination against the people of the more populous States.

The United States Constitution was fashioned on the view that a system of checks and balances, with its familiar examples of thwarting unrestrained majority rule, furnishes the wisest form of government. After all, a pure example of unchecked majority rule is a lynching. The Framers proceeded on the premise that protection of minority rights and enforcement of civilized processes of law are possible only if effective brakes are imposed on majority impulses.

Paradoxically enough, Sincock *et als.* here invoke the checks-and-balance machinery of judicial review in their effort to remove checks and balances from the governmental structure of the State of Delaware.

C. Any question whether the principle of unrestrained majority rule is better or wiser than a system of checks and balances is inappropriate for judicial resolution on the footing of writing absolutes into broad constitutional provisions. Only this year, *Ferguson* v. *Skrupa*, 372 U.S.

726, stressed the basic fallacy underlying the decisions of another age that erected judgments regarding social and economic desirability into immutable constitutional principles.

There is no present danger of a reversion to those earlier standards under the Due Process Clause. But there is grave danger in the position of those who now urge the Court to write their political theories into the Equal Protection Clause, particularly on the present footing of making a drastic break, without intervening experience or interpretation, in the meaning of that Clause as revealed by its contemporary Congressional interpretation and enforcement. Even the least defensible and most extreme Due Process decisions were, after all, the product of a scalpel, not of a meat-axe. But Sincock *et als.* here ask the Court to amend the Equal Protection Clause by fiat, to make it mean precisely the opposite of what the Reconstruction Congresses by legislation showed it to mean.

Their argument that "the debasement of the Civil Rights of the plaintiffs" is involved will not survive analysis. First, no provision of the Constitution today enjoys preference over any other. Second, vital though the right to vote admittedly is, Sincock *et als.* have never been denied the right to vote. Third, a State of the Union has a large and mighty interest in how its own government shall be constituted and constructed, and this interest cannot properly be minimized by attaching the labels of "liberties" and "rights" to the contentions of individuals in that State who prefer another kind of organic structure.

This Court's experience with doctrinaire interpretations of the Due Process Clause, see *Ferguson* v. *Skrupa*, 372 U.S. 726, stands as a solemn warning against similarly doctrinaire interpretations of the Equal Protection Clause.

III. A. The Equal Protection Clause does not strike down classifications that have a reasonable basis, even though a court as an original proposition might be able to

devise other classifications that may seem more logical or symmetrical. See, for recent expositions of this principle, *McGowan* v. *Maryland*, 366 U.S. 423; *Morey* v. *Doud*, 354 U.S. 457; *Goesaert* v. *Cleary*, 335 U.S. 464.

The apportionment of the Delaware General Assembly effected by the 1963 amendment to that State's constitution has a perfectly rational basis, is patterned on institutions that are the very warp and woof of American life, and reflects the fact that, just as the United States was formed by a union of States, so Delaware was formed by a union of Counties.

The disproportion between New York and Alaska in the Senate of the United States on the basis of the 1960 census, 74 to 1, is infinitely greater than those between New Castle and Kent and Sussex Counties in Delaware, which were then, respectively, 4.68 to 1 and 4.2 to 1. The latter disparities are also far less than the 5.7 to 1 in Georgia and the 5.2 to 1 in South Carolina, both of which satisfied the Reconstruction Congress in 1868.

B. The 1963 amendment to the Delaware Constitution reapportioning that State's House of Representatives has a reasonable basis, reflects a good faith effort to comply with *Baker* v. *Carr*, provides for periodic reapportionment as the population of the State shifts over the years, and contains an effective enforcement provision. There is no basis for the holding of the district court that this reapportionment had no rational basis, much less for the court's view that the Equal Protection Clause permits no greater disparity between representative districts than 1½ to 1 and forbids a ratio of as high as 2 to 1. The latter interpretation reflects a limitation that, all too plainly, originated not in the Fourteenth Amendment but only in the preferences and predilections of the district court.

C. The 1963 amendment to the Delaware Constitution that reapportioned that State's Senate is, in its major

feature of equal county representation, fully supported by what has already been said. The plan for the floterial senators from Kent and Sussex counties is amply sustained by the views of Judge Layton, dissenting below. Such imperfections as exist are directly attributable to the very short period of time that the district court allowed the Delaware General Assembly for drafting the amendment. Having been composed under judicial pressure, the resultant plan cannot be attacked as irrational simply because, with less time pressure, it would have been possible to formulate a better one.

The circumstance that the less populous and less prosperous counties (i.e., which pay less in taxes) have the same representation in the Delaware senate as New Castle County, which has more people and pays more taxes, does not condemn the 1963 amendment. The Equal Protection Clause did not resurrect the Federalist Party's philosophy that government should be entrusted only to "the wise, the good, and the rich," nor does it forever subject the few and the poor to the domination of the many and the rich.

IV. A. On any objective reading, the present record reflects a dominant theme of pressure by the district court against a time limit. Each of that court's opinions emphasizes a spirit of haste.

Its first opinion, granting the General Assembly of Delaware only a 13-day stay, contributed directly to the imperfections of the constitutional amendment ultimately adopted. A second stay was denied. As a matter of political stability, apportionment had been a constitutional matter in Delaware since 1776, yet the district court suggested that it should be regulated by statute, and then expressed annoyance that the General Assembly had not adopted its suggestion for such a fundamental departure in State constitutional policy.

The "box of time" of which the presiding judge below so consistently complained was fashioned by the district

court itself; the record amply confirms the view of the chairman of the Governor's Bipartisan Reapportionment Committee that the district court "had a gun at the back of the General Assembly of Delaware."

Very plainly, that court disregarded the principles that should govern litigation involving a State of the Union, which this case does. In the long litigation between Virginia and West Virginia, which concerned only a claim for money due, this Court proceeded deliberately rather than precipitately.

Here, however, in a controversy revolving around the grave problem of a State's very structure of government, where virtually every issue was new, where no apportionment guidelines had ever been formulated here, and where *Gray* v. *Sanders*, 372 U.S. 368, 376, had specifically reserved the major issue in this case, viz., whether a State legislature can constitutionally be patterned on the Federal model, the district court, disregarding this Court's standards for the conduct of litigation involving States, harried and hurried the election officials who represented Delaware as though they were delaying compliance with a turnover order in bankruptcy.

B. It is common ground between the parties that the combination of the decree and the injunction below effectually prevent any amendment of the Delaware Constitution under either of the two amending methods therein provided.

One such method is the adoption of an amendment by a two-thirds vote of both houses of the General Assembly, followed by similar votes in the next General Assembly elected after an intervening general election. If the injunction entered below remains in force, then no second General Assembly can ever be elected.

The other method is amendment by Constitutional Convention. But if because of malapportionment a new General Assembly cannot be validly constituted, neither

can a Constitutional Convention, and for the same reason. This follows because the 1963 amendment continues the 1897 provisions for such a Convention, which do not even reflect the ten new Representative Districts provided for in that amendment.

The injunction cannot be supported as an exercise of sound discretion; the basic issue was at the very least, far too unclear. In fact, the injunction was issued after (1) the Supreme Court of Delaware had advised the Governor that since the district court's decree invalidating the 1963 amendment was not final but subject to appeal, he was required to act thereunder, and after (2) the Governor had acted accordingly.

Thus the entire constitutional apparatus of a State of the Union and its entire electoral machinery were paralyzed by Federal judicial decree because the Delaware election officials refused to accept as conclusive pending appeal the district court's Design for Delaware. It took an application to the Circuit Justice for a stay, promptly granted, to effect a return to normal judicial standards.

We feel no need to vary by a single word our earlier contention that what the district court did here "is more than an abuse of discretion. This is an abuse, a gross abuse, of judicial power."

C. Had the district court allowed the Delaware General Assembly more time; the reapportionment amendment could easily have been perfected. Such a plan, using the basic Federal pattern, but providing for the equalization of Representative and Senatorial Districts within each of the counties, has in fact been prepared since. The circumstance that no action has yet been taken thereon while the present appeal was pending by no means establishes that Delaware is either unwilling or unable to effect a proper apportionment once this Court has spoken.

Just as the actual enforcement of a judgment against a State of the Union, cf. *Virginia* v. *West Virginia*, 246 U.S.

565, is a step coming at the end of the judicial process, not to be lightly undertaken or even entertained, so in a State reapportionment case reapportionment by Federal judicial decree should be the very last resort, a step to be taken only when all else has failed. Yet the court below seems to have been irresistibly drawn to that course as the preferred first order of business, from the very beginning of the litigation and throughout its course. Finally, by disabling the State from ever amending its own Constitution, the district court here virtually assured to itself the task of reapportioning Delaware by Federal judicial decree, a task that Sincock *et als.* urged it to assume, and for which the presiding judge declared himself quite ready.

Only the current "Court of the Union" proposal would be equally as destructive of proper State-Federal relationships as the course so relentlessly pursued and pressed by the district court in this case.

ARGUMENT

This Delaware reapportionment case presents three new features not heretofore submitted to the Court in any of the similar reapportionment cases from the four other States—New York (No. 20), Alabama (Nos. 23, 27, 41), Maryland (No. 29), and Virginia (No. 69)—that are scheduled for argument commencing on November 12.

First. It is and has been argued in many reapportionment cases that States are forbidden to construct their legislatures on the Federal plan because, while the latter represented a compromise effected when the thirteen original States created the United States, the analogy is inapplicable within a State, because while a State creates counties, counties were never sovereign and hence did not create the State.

Whatever may be the case elsewhere, this too facile analysis is demonstrably untrue of Delaware. For Delaware was never a formal political unit until September

1776, when the Three Lower Counties of New Castle, Kent and Sussex, upon Delaware, created the Delaware State. At that point, those Counties had no real executive; they were banded together only in an Assembly in which each county was equally represented; they had no organic law; and in 1745 even the legitimacy of their legislature had been questioned by Lord Mansfield while Attorney General. These then, were sovereign Counties, and it was they who formed "The Delaware State."

Consequently, if there is any one State that is now completely free to follow the Federal arrangement for its legislature, Delaware is that State. Yet the court below brushed aside the facts of Delaware history—and with an epigram proceeded to ignore them.

Second. The Delaware election officials here have looked for the meaning of the Equal Protection Clause of the Fourteenth Amendment, not in preconceived notions of political philosophy sought to be injected into that Clause as a constitutional absolute for all time, not in the published views of Founding Fathers who had been dead for decades when the post-Civil War Amendments were being fashioned, but primarily and preeminently in the debates and in the legislation of the Reconstruction Congresses closest in time to the drafting, submission, ratification and enforcement of the Fourteenth Amendment.

These materials demonstrate that, when Congress was considering the readmission of the States that had been part of the Confederacy, a step that was expressly conditioned on ratification of the Fourteenth Amendment and which involved the most rigid scrutiny of the new constitutions submitted by those States, it readmitted two such States that patterned their legislatures on the Federal model, with an upper house apportioned by counties, so that in fact there were population discrepancies between the several senatorial districts on the order of between 5 and 6 to 1. Yet although the readmission process was a

long and frequently bitter one, although new conditions were imposed upon the more recalcitrant States, and although there was even discussion over whether "adoption" of the Fourteenth Amendment by a State legislature constituted compliance with the condition that this amendment be "ratified", the debates show that the primary concern of Congress was whether the new constitutions were republican in form and consistent with the specific prohibitions of the Fourteenth Amendment, see *United States* v. *Florida*, 363 U.S. 121, and—most significantly—that no one in either house of Congress, over a period of more than two years, ever said or even inferred that a State patterning its legislature on the Federal plan was thereby denying its citizens the equal protection of the laws.

These highly significant circumstances, as vital to an understanding of the Fourteenth Amendment as the *Records of the Federal Convention* and *The Federalist* are to an exposition of the original Constitution, were first presented in necessarily summary fashion in the Jurisdictional Statement in the present case. They were not mentioned, much less relied upon, when the Federal pattern was sustained in its application to a State legislature, as in the Maryland case below; they were not mentioned when, as in this case below, the district court held that the Equal Protection Clause prohibited a State from following the Federal arrangement; and the United States as *amicus curiae* in all of the other State cases, which asserts (U.S. Br. A.C., No. 29, p. 80) that "The framers were in agreement that, as to a State government, with full powers directly over the people, both houses must be apportioned on the basis of population," draws only on materials up to 1836, and studiously passes by in silence the Congressional enforcement of the Fourteenth Amendment in the Reconstruction period, action consistent only with precisely the opposite conclusion.

Third. This case raises another issue that should not go unnoticed, namely, the way that a Federal court has

here hurried and harried a State of the Union in a case involving the very structure of a State government. Consequently just as this Court in the long *Virginia* v. *West Virginia* litigation—which concerned merely a claim for money—proceeded slowly and patiently, so the district court here should have allowed the State of Delaware ample opportunity to amend its fundamental law to conform to what this Court would ultimately declare as the governing standards for State apportionment. Instead, the district court granted the officials here, who as nominal defendants represented the State, a mere 13-day stay, a circumstance that was reflected in the provisions of the amendment drafted under that deadline and ultimately adopted.

Finally, after entry of the decree below, and well before the time for appeal therefrom had expired, the district court, on its own motion and without notice or hearing, issued an injunction that paralyzed the State's entire electoral machinery, and that moreover effectively precluded the State of Delaware from ever amending its Constitution in either of the two ways provided in that instrument. Then, after the appeal from the final decree had been noted, the district court refused to stay the operation of its injunction pending appeal. While the latter ruling was promptly set aside by the Circuit Justice's stay, the fact that application here became necessary at all simply underscores the precipitancy of the district court's conduct of the present litigation.

I. THE FEDERAL ANALOGY OF AREA REPRESENTATION IN THE SENATE OF THE UNITED STATES IS FULLY AND EXACTLY APPLICABLE IN DELAWARE. WHERE COUNTIES WERE NEVER CREATURES OF THE STATE, BUT WHERE, TO THE CONTRARY, THE STATE WAS CREATED IN SEPTEMBER 1776 BY THE THEN EXISTING SOVEREIGN THREE LOWER COUNTIES.

Delaware's history is different from that of any other State; indeed, it is unique.

This Court should accordingly weigh that history most carefully, lest it make sweeping pronouncements regarding the relationships of States to their counties, that, however correctly they may set forth the devolution and development of the other States of the Union, would be plainly erroneous in the case of Delaware.

A typical such pronouncement underlies the currently held assumption of numerous practitioners of political science that the Federal analogy of area representation in one legislative house is inherently inapplicable, and hence unconstitutional, when followed in the governmental structures of the several States. See e.g., *One Man—One Vote.* (The Twentieth Century Fund, 1962) 9, where it is said: "Thus the Senate was a condition of union among a group of states which the Federal Government created by that union has no power to destroy. Counties, by contrast, were never independent or sovereign. They did not create the states but were created by them."

This facile generalization, which has now been espoused by the Solicitor General (U.S. Br., *A.C.*, No. 29, p. 82, n. 47, and p. 89; U.S. Br., *A.C.*, No. 20, p. 30), is demonstrably untrue of Delaware.

The several professors of political science who composed the pamphlet just quoted, like those who testified in this case, were generally unfamiliar with the history and traditions of the Delaware Counties (Tr. 64, 226-227, 366-376). We adduce those materials here, from historical materials well within the realm of judicial notice, and

from the testimony below of the State Archivist, Mr. Leon de Valinger, Jr., a recognized authority on Delaware history (Del. App. 12a-50a).

The traditions of the Delaware Counties had their beginnings in the early Dutch judicial districts in Delaware, of which there were two in 1673 (5 *Pennsylvania Archives, second series* [Harrisburg, 1877] 631); those districts were perpetuated by the Duke of York when they passed out of Dutch hands forever in that year (*Records of the Court of New Castle on Delaware, 1676-1681* [Col. Soc. of Pa., Lancaster, 1904] 6), and in 1680 the Duke created the third county (*id.*, at 385; Del. App. 15a-16a).[1]

In 1682, the Duke of York conveyed all three counties to William Penn (*New Jersey* v. *Delaware*, 291 U.S. 361, 364-365; for the deeds of feoffment, see 1 *Laws of Delaware* [1797] App. 1, 4). Two months later, William Penn joined the three counties to his own Province of Pennsylvania, in an Act reciting "that they may live under the same laws and government that the inhabitants of the said province of Pennsylvania, now do, or hereafter shall enjoy." (Act of Union, for annexing and uniting the counties of New-Castle, Jones's, and Whorekills, alias New-Dale, to the province of Pennsylvania, 1 *Laws of Delaware* [1797] App. 8, 9).[2] In 1683, Penn gave the counties their present name, Jones's becoming Kent County, while "Whorekills, alias New Dale" became Sussex County (Del. App. 16a).

These three counties on the Delaware were not originally a separate colony, but shared representation with the

[1] See, generally, De Valinger, *The Development of Local Government in Delaware 1638-1682* (Newark, Del., 1935), the thesis referred to in the testimony at Del. App. 12a, 13a, and 15a.

[2] This Act of Union was signed by Penn as "Proprietary and Governor of this province, and territories thereunto belonging, being the second year of his government, by the King's authority." 1 *Laws of Delaware* [1797] App. 10.

other counties in the Pennsylvania Assembly, in which each county had equal representation *qua* county (PTO, ¶C40; Del. App. 17a). Relations between the Province of Pennsylvania proper, and the three Lower Counties on the Delaware, or The Territories of Pennsylvania, as they were also called, were not harmonious, and when Penn granted his Charter of Liberties in 1701, it permitted within three years "a distinct Assembly for the Territories," with equal representation for each county (1 Thorpe 557, 561; 1 *Laws of Delaware* [1797] App. 31, 42-43).

As Judge Richard S. Rodney pointed out in his *Early Relations of Delaware and Pennsylvania*, 54 Pa. Mag. of Hist. & Biog. 209, 232, 235, 237, the last Assembly session in which the Province and the Three Lower Counties joined in legislation took place in September 1701, while the first Assembly for the Three Lower Counties met in November 1704; the latter body, pursuant to the charter, consisted of four, later six, representatives from each county.[3]

During the reign of Queen Anne, the caption in court records appeared as follows (De Valinger, ed., *Court Records of Kent County, Delaware, 1680-1705* [8 Am. Legal Records; Am. Hist. Assn. 1959] 340):

> "By the Queens Authority and in the Proprietarys Name Att a County Court or Court of Common Pleas held for the County of Kent One of the Countys of New Castle Kent And Sussex on Delaware * * *" *

Before the legislative separation, the enacting clause of legislation passed in the year 1700 appears in this form (1 *Laws of Delaware* [1797] 51):

> "Be it enacted, by the Proprietary and Governor, by and with the advice and consent of the freemen of

[3] Judge Rodney was a Justice of the Supreme Court of Delaware from 1922 to 1946, after which he became a United States District Judge. Although he retired on January 1, 1957 (237 F. 2d x), he is still active. See, e.g., *Small* v. *United States*, 219 F. Supp. 659 (D.Del.; June 1963).

this province, and counties annexed, in General Assembly met, and by the authority of the same."

A variant on the same page speaks of "the freemen of this province and territories."

Following the legislative separation, the enacting clause of a law passed in 1704 appears as follows (1 *Laws of Delaware* [1797] 55):

> "Be it enacted by the honorable John Evans, esq. with her Majesty's royal approbation Lieutenant Governor of the counties of New-Castle, Kent, and Sussex, on Delaware, and province of Pennsylvania, by and with the advice and consent of the freemen of the said counties, in General Assembly met, and by the authority of the same, * * *"

An interesting differentiation appears in an Act passed on November 4, 1742 (1 *Laws of Delaware* [1797] App. 62):

> "Be it enacted by the honourable George Thomas, esq. with his Majesty's royal approbation, Lieutenant Governor and Commander in Chief of the counties of New-Castle, Kent and Sussex upon Delaware, and province of Pennsylvania, under the honourable John Penn, Thomas Penn and Richard Penn, esqrs. true and absolute proprietaries of the counties and province aforesaid, by and with the advice and consent of the Representatives of the freemen of the said counties in General Assembly met, and by the authority of the same."

In the last Act passed before Independence, but after Lexington, Concord, and Bunker Hill (Act of Oct. 28, 1775; 1 *Laws of Delaware* [1797] 587, 588), the clause appears in these terms:

> "Be it enacted by the honorable John Penn, esq. with his Majesty's royal approbation, Governor and Commander in Chief of the counties of New-Castle, Kent and Sussex, upon Delaware, and province of Pennsylvania, by and with the advice and consent of

the Representatives of the freemen of the said counties in General Assembly met, and by authority of the same."

In the first part of the year 25 George II (June 1751-June 1752), there was passed an Act (1 *Laws of Delaware* [1797] 299, c. cxxii) "for the making and establishing a new Great Seal for the use of this government," which was ordered to be engraved (Sec. 3, p. 300) "with the arms of the King of Great Britain, and an inscription of the words, *Counties on Delaware*, and the figures 1751, round the same."

Interestingly enough, while during the period from 1700 to 1776, some 587 laws of the Province of Pennsylvania were submitted to the Privy Council for approval, no law enacted by the Assembly of the Three Lower Counties as such seems ever to have been so submitted (Report of the Special Master, pp. 40-41, filed in *New Jersey* v. *Delaware*, 291 U.S. 361, and confirmed by ¶1 of the Court's subsequent order, 295 U.S. 694).[4]

Three compilations of laws passed by the Assembly of the Three Lower Counties were printed during the Colonial period, two at Philadelphia in 1741 and 1752, respectively (1 *Catalogue of the Library of the Law School of Harvard University* [1909] 540; Def. Ex. 653, *NJ* v. *Del.*), and a third at Wilmington in 1763 (Def. Ex. 656, *NJ* v. *Del.*). Each is titled, "Laws of the Government of New-Castle, Kent and Sussex, upon Delaware."

Perhaps the most interesting document in respect of the light that it throws on the legal status of that government is a memorandum written by Attorney-General Sir William Murray (later Lord Mansfield, L.C.J.), in which was inclosed the petition of Mr. Ferdinando John Paris,

[4] The papers in this case, filed under No. 11, Orig., Oct. T. 1934, contain a mass of documentary material bearing on the early history of Delaware. Such papers will hereafter be cited simply by exhibit number and *NJ* v. *Del.*

London agent for the Penns, regarding the submission for approval of laws passed by the Assembly for the Three Lower Counties. The Attorney General wrote on September 1, 1745 (Pl. Ex. 494, *NJ* v. *Del.*):[5]

"OTHER ACTS, of other Assemblys, are usually laid before the Crown in Co'll [Councill], without any Pet'n at All, to introduce them; But, Such a method will not do, in the present Case; because tho other Assemblys, & their Powers & Constitutions, are very well known, Yet, it is not so, with Respect to the Assembly of the Lower Co'tys, From whence the present Act comes.

"And, as All Orders of Co'll, w'ch are made for approving American Acts of Assembly, recite that the Gov't, Co'll & Assembly of such a Province, are authorized to enact Laws & have enacted such a Law, w'ch Law, his Ma'ty thereby approves, We shall not be able, ever, to have an Order of Co'll drawn up (if this Act sho'd be approved) unless the Matter be specially introduced, with some Petition, to state the Many Special & Uncommon Circumstances, w'ch attend the Constitution & Gov'm't of the Three Lower Countys.

. . . . . .

"I am fearful of trusting Myself, in an Affair of this high Consequence, even to the Being of the Assembly of the Three Countys, For Grants to the Duke of York in 1663, 1674, & 1682, altho' they contain Powers to him, his Heirs & Assigns, & to his Deputys, Officers & Ministers, to make Laws, in the Tracts of Land thereby granted; do not, in express Terms, give them Liberty to call Assemblys of the People, or their Freemen, or their Deputys, for that Purpose.

. . . . . .

"I am of opinion that it is by no Means advisable for the Three lower Countys to present any Petition of this Sort at all; it would be stirring a General Ques-

[5] The original document is in the library of the Historical Society of Pennsylvania, under Misc. Papers of the Three Lower Counties, pp. 193-201.

tion in a very unfavorable Instance; And as the Crown has never yet approved of any of their Laws, it will be considered as a Stratagem to get some Countenance to their Legislative Authority, which I doubt will not yet bear a strickt Examination."

Accepting as true the Special Master's finding in *New Jersey* v. *Delaware* (Report, p. 41) that "The existence of a separate Assembly for the Delaware counties, and the exercise of all powers of legislature by such Assembly was well known to the Board of Trade and the crown authorities, and as in the case of Penn's assertion of his right as proprietary and owner, no action was ever taken by the Crown to challenge the power of government thus exercised," still that circumstance does not cure the defect noted by Sir William Murray, A.G. For, very obviously, prescription does not run against the Crown. The result is that long acquiescence, even with the fullest knowledge, does not do service for the non-existing Royal grant of legislative power.

A royal patent was in fact drawn, whereby James II undertook to grant to William Penn what is now Delaware. "* * * we have thought fit to erect and do hereby erect the aforesaid county and islands into a province and seigniory and do call it the Lower Pennsylvania and so from henceforth we will have it called." Under that grant, Penn would have had "full and absolute power to divide the said county and Island into towns, hundreds and counties, and to erect and incorporate Towns into boroughs and boroughs into cities." But this charter was never signed; its preparation was only completed on December 10, 1688, the night before James II fled from Whitehall and left England forever.[6]

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[6] The text of the draft charter is Def. Ex. 550, *NJ* v. *Del.*; the quoted passages are from pp. 7 and 12, respectively. The original is in the Penn Papers of the Historical Society of Pennsylvania. The text is also available in Konkle, *Delaware: A Grant Yet Not a Grant*, 54 Pa. Mag. of Hist. & Biog. 241, 245-254.

In sharp contrast to virtually every other colonial legislature in British North America, the Three Lower Counties had no council or upper house whatever. As a matter of practice, if the Governor or Lieutenant Governor disagreed with any portion of an act passed by the Assembly, he would return it with his objections, following which it would be amended to meet those objections and repassed, or else further correspondence or conferences would ensue. The operation of this legislative process, which may well have been unique, is clearly reflected in the two published volumes of early legislative records. *Minutes of House of Assembly of the Government of the Counties of New Castle Kent and Sussex upon Delaware at Sessions held at New Castle in the Year 1739* (Pub. Archives Comm. of Del. 1929); *Minutes of House of Representatives of the Government of the Counties of New Castle, Kent and Sussex upon Delaware at Sessions held at New Castle in the Years 1765-1770* (Pub. Archives Comm. of Del., 1931 [reprint of 1770 original]).

What, then, was the status of the Three Lower Counties upon Delaware prior to Independence?

Judge Rodney wrote (*Early Relations of Delaware and Pennsylvania*, 54 Pa. Mag. of Hist. & Biog. 209, 218, 240):

> "The territory now embraced in our little State was an anomaly among the English colonies. No sovereign's charter gave us a name and with all the panoply and emblazonments of Royalty granted our land to settlers. As a matter of fact, although we had a distinct existence with a separate assembly from 1704, yet, with the exception of 'The Territories of Pennsylvania' or the "Three Lower Counties on the Delaware" (neither of which names was authoritatively established), we never had a name until our First Constitution of 1776, adopted pursuant to the Resolution of the Continental Congress, gave us our name as 'The Delaware State.' * * *"

* * * * * *

"* * * after the [legislative] separation, the slender thread of a common Governor was all that bound the Counties to the Province.

* * * * *

"From the beginning of the Colony two ties bound us to the Province of Pennsylvania—the Legislative and Executive bands. * * * When [the Legislative Union] was severed nothing but a thin Executive or Proprietary ligament joined us to any outside power, and when the Declaration of Independence threw off this last connection and placed the Executive Power in the people themselves, then the long familiarity with legislative freedom established by almost eight decades of independent action (during which no laws were ever submitted for approval to the crown), allowed the Delaware State to smoothly glide into and through the Confederation of Colonies and emerge as the First State of the New Union."

Before we turn to the events of 1776, two digressions are in order.

First, in the famous lawsuit between William Penn and Lord Baltimore, which was ultimately settled by the drawing of the Mason-Dixon line, there were determined not only the boundaries between Pennsylvania and Maryland, but also those between Lord Baltimore's Province of Maryland and Penn's Territories or Three Lower Counties on Delaware. See *Penn* v. *Lord Baltimore*, 1 Ves. Sen. 444; s.c. *sub nom. Pen* v. *Lord Baltimore*, Ridg. t. H. 333; see map at 87 Pa. Mag. of Hist. & Biog. 290 (July 1963 issue).

Second, during the years immediately preceding 1776, contemporaries almost invariably referred to what is now Delaware as the Lower Counties.

In the early Journals of the Continental Congress, they are referred to in various ways: as "Delaware Counties" (1 J. Cont. Cong. 50; 2 *id.* 12), "the counties on Delaware" (4 *id.* 226), "3 counties" (1 *id.* 28, 29), "Lower Counties" (4 *id.* 400), "the Lower Counties on Delaware" (1 *id.* 82,

103, 2 *id.* 18; 3 id. 418, 429), "the Counties of New Castle, Kent and Sussex, on [or "upon"] Delaware" (1 *id.* 90, 105, 115; 3 *id.* 304, note 1), "the three lower counties on Delaware" (4 *id.* 68-69, 80), "the three lower counties of New Castle, Kent, and Sussex on Delaware" (*id.* 75-76; cf. 1 *id.* 80), "New Castle, Kent and Sussex on Delaware" (1 *id.* 14, 66), "the three lower counties on Delaware government" (4 *id.* 130, 132; cf. 5 *id.* 436, "counties on Delaware for the use of the militia of that government").

While the official though self-assumed name of this loose alliance was "The Government of the Counties of New Castle, Kent, and Sussex, upon Delaware" (*Minutes of House of Assembly* • • • *1739, Minutes of House of Representatives* • • • *1765-1770*, both *supra;* Preamble to Del. Const. 1776, 1 Thorpe 562; see 1 J. Cont. Cong. 21), the Journals of the Continental Congress, prior to Statehood, contain only some scattered references to a "Delaware Government" (plate facing 1 J. Cont. Cong. 120; 1 *id.* 28; 3 *id.* 304; 4 *id.* 349, 413; 5 *id.* 436, 440, 631, 644). And, as has been seen, that government's seal was inscribed "Counties on Delaware."

We have found no references, whatever, in any form of words, to the three counties *of* Delaware.

Contemporaneous writing reflect the same usage. Thus, Samuel Ward of Rhode Island, a delegate to the Continental Congress, noted in his diary for Sept. 11, 1775 that "several Pennsylvania, lower County, Maryland, Virginia and South Carolina and Georgia delegates met" (1 Burnett, ed., *Letters of Members of the Continental Congress*, 192). Similar usage appears in the Adams and Jefferson papers (2 *Diary and Autobiography of John Adams* (Butterfield ed. 1961) 114, 121, 189, 190, 193, 204, 206, 207; 1 Burnett, *supra*, 490, 491 (letter John Adams to Samuel Chase, June 14, 1776: "McKean has returned from the lower counties with full powers"); 1 *The Papers of Thomas Jefferson* (Boyd ed.) 182, 310, 311, 314).

Independence for the Three Lower Counties was triggered by a resolution of the Continental Congress adopted on May 10, 1776 (4 J. Cont. Cong. 342),

> "That it be recommended to the respective assemblies and conventions of the United Colonies, where no government sufficient to the exigencies of their affairs have hitherto been established, to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general."

John Adams later exulted in his Autobiography (3 *Diary and Autobiography of John Adams, supra*, 383), "This Resolution I considered as an Epocha, a decisive event."

Five days later, Congress adopted a rousing preamble to the foregoing resolution, drafted by a Committee of which Adams was a member, which said in pertinent part (4 J. Cont. Cong. 357, 358),

> "And whereas, it appears absolutely irreconcileable to reason and good Conscience, for the people of these colonies now to take the oaths and affirmations necessary for the support of any government under the crown of Great Britain, and it is necessary that the exercise of every kind of authority under the said crown should be totally suppressed, and all powers of government exerted, under the authority of the people of the colonies, for the preservation of internal peace, virtue, and good order, as well as for the defence of their lives, liberties, and properties, against the hostile invasions and cruel depredations of their enemies; therefore, resolved, &c."

When the preamble was adopted, Adams noted (3 *Diary and Autobiography of John Adams, supra*, 386), "Mr. Duane called it, to me, a Machine for the fabrication of Independence. I said, smiling, I thought it was independence itself: but We must have it with more formality yet."

In a somewhat more mundane vein, Caesar Rodney, a delegate to Congress from the Three Lower Counties, had written concerning the entire resolution (Ryden, ed., *Letters to and from Caesar Rodney, 1756-1784* [1933] 79, 89), "Continuing to Swear Allegiance to the power that is Cutting our throats, and attesting jurors to keep the Secrets and try offenders against the peace of our Sovereign Lord the King &c is Certainly absurd."

Following an acrimonious local controversy as to whether any change in government was necessary, the Assembly of the Three Lower Counties met on June 11, 1776 (Part 1, "The Three Lower Counties Become the Delaware State," in John A. Munroe, *Federalist Delaware, 1775-1815* (1954) 15). Then, on June 14, "In the House of Representatives for the Counties of Newcastle, Kent, and Sussex, upon Delaware, at Newcastle," a certified copy of the Continental Congress's resolution-cum-preamble was read—it had been personally presented by Thomas McKean, another of the Lower Counties' delegates to Congress—whereupon it was unanimously resolved "That this House do approve of the said Resolution of Congress," (Force, *American Archives*, 4th series, vol. 6, pp. 883-884).

On the next day, the Assembly adopted and passed the following additional resolution (Force, *ut supra*, at 884):

> "Whereas it is become absolutely necessary for the safety, protection, and happiness of the good people of this Colony, forthwith to establish some authority adequate to the exigencies of their affairs, until a new Government can be formed: And whereas the Representatives of the people, in this Assembly met, alone can, and ought at this time, to establish such temporary authority:
>
> "*Resolved unanimously*, That all persons holding any office, civil or military, in this Colony, on the 13th day of *June* instant, may, and shall continue to exercise the same, in the name of the *Government* of the

> Counties of *New Castle*, *Kent*, and *Sussex*, upon *Delaware*, as they used legally to exercise it in the name of the King, until a new Government shall be formed, agreeable to the Resolution of Congress of the 15th of *May* last."

Caesar Rodney himself had written (Ryden, *supra*, at 81) that he thought the foregoing resolution amounted to a declaration of independence. Munroe accordingly concludes (*supra*, p. 15), that "June 15, 1776 is the real birth date of an independent Delaware. The action taken that day to divorce the three counties from Great Britain was supported by the joint action taken in Congress on July 2, 1776, birth date of the nation."

But, he adds (*supra*, p. 83), "The new government was not formed until after a state constitution was adopted on September 20; meanwhile Delaware was governed under the terms of the June 15 resolution by its old colonial officials, the one notable change being that Caesar Rodney, as speaker of the Assembly, had replaced Governor John Penn as the chief executive."

On July 4, 1776, Caesar Rodney—who while Delegate to Congress was simultaneously Speaker and quondam chief executive—issued from Philadelphia summonses to the sheriffs to call the members from the three counties to meet at Newcastle on July 22 (Ryden, *supra*, 94).

When the Assembly met, it resolved on July 27 (*Proceedings of the Convention of the Delaware State held at New-Castle on Tuesday the Twenty-Seventh of August, 1776* [Wilmington, 1776; pagination from 1927 reprint] 5-6):

> "That it be recommended to the Good People of the several Counties in this Government to chuse a suitable Number of Deputies to meet in Convention, there to ordain and declare the future Form of Government for this State.

"Resolved also,

"That it is the Opinion of this House, That the said Convention consist of the Number of Thirty Persons, that is to say, Ten for the County of New-Castle, Ten for the County of Kent and Ten for the County of Sussex; and that the Freemen of the said Counties respectively, do meet on Monday the nineteenth day of August next, at the usual Places of Election for the County, and then and there proceed to elect the Number of Deputies aforesaid, according to the Directions of several Laws of this Government for regulating Elections of the Members of Assembly, except as to the Choice of Inspectors, which shall be made on the Morning of the Day of Election by the Electors, Inhabitants of the respective Hundreds in each County."

By some quirk of local politics, Caesar Rodney was not elected to the Convention (*Proceedings*, 6-7), which chose George Read as its President. It functioned in part as a normal legislature, particularly with respect to military matters and military appointments, which in the summer of 1776 plainly could not wait on a new form of government (*Proceedings*, 10-12, 14-16, 20-23, 36-43). On September 11, 1776, the Convention adopted "A Declaration of Rights and Fundamental Rules of the Delaware State, formerly stiled, The Government of the Counties of New-Castle, Kent and Sussex, upon Delaware" (*Proceedings*, 17-20; 1 Del. Code Ann. [1953] 81-83; see Farrand, *The Delaware Bill of Rights of 1776*, 3 Am. Hist. Rev. 641; H. Clay Reed, *The Delaware Constitution of 1776* (Delaware Notes, 6th Series, 1930) 7, 22-23).[7]

Finally, on September 20, 1776, the Convention adopted a Constitution (1 Thorpe 562; 1 Del. Laws [1797] App. 82-91; 1 Del. Code Ann. [1953] 85), under which Delaware was to be governed for sixteen years, and whose first article provided that—

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[7] By a strange oversight, this document does not appear in Thorpe's *Federal and State Constitutions*.

> "The government of the counties of New-Castle, Kent and Sussex, upon Delaware, shall hereafter in all public and other writings be called, *The Delaware State.*"

It was not until then that the Journals of the Continental Congress refer to "Delaware State" (6 J. Cont. Cong. 1000, document dated Nov. 8, 1776).

What can we say of the political nature or quality of the Three Lower Counties before that date?

As has been seen, they had a separate legislative assembly from 1704, in which each county was equally represented. They shared their executive with Pennsylvania, but never had any council. Over a period of more than 70 years, their laws were never submitted to the Privy Council for approval, and Lord Mansfield (*supra*, pp. 38-39) seriously questioned whether their Assembly had ever been lawfully constituted as a legislative body.

Such sovereignty as there was resided in the separate counties (Del. App. 20a). After June 15, 1776, the old executive was discarded, and the Speaker of the Assembly assumed certain ministerial functions of an executive nature, in much the same attenuated sense that the President of Congress was the only executive available to the newly independent United States. But who, other than the Speaker of the Assembly, was even the nominal executive of the Lower Counties in August and September 1776 when the Convention acted as a legislature and the Speaker no longer functioned as such?

The hard fact of the matter is that there was then no executive at all, except possibly for the convention itself, and that some or all of the Three Lower Counties could, had they been so minded, have joined Pennsylvania or Maryland or formed separate States. This significant point is not in dispute between the parties; the testimony on this issue of Delaware's Archivist, Mr. de Valinger (Del. App. 28a),

is fully concurred in by Dr. Royce Hanson, Associate Professor of Government and Public Administration at American University, whom Sincock *et als.* called as an expert.[8]

The Three Lower Counties were not so minded, because they had a long tradition of allied separatism. Once the sovereignty of the Proprietary and the suzerainty of the crown were thrown off, the Three Lower Counties upon Delaware became a loose confederacy of independent units, just as the United States, under the Articles of Confederation, were a loose confederacy of sovereign States.

But whereas the Articles of Confederation carefully spelled out the powers that were delegated to Congress, the limitations placed on the States, and the relations that the States were to observe among themselves, the Three Lower Counties had no instrument of government whatever. The Three Lower Counties' very existence as a confederated alliance rested solely on William Penn's duly observed promise of "a distinct Assembly for the Territories," and on such laws as that "distinct Assembly" had enacted over the years. And yet, as has been seen, a lawyer as profound as Lord Mansfield had questioned the legitimacy of this very Assembly, which was the sole ligament joining the counties together.

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[8] Here is the latter's testimony on cross-examination (Tr. 287):

"Q Do you know what choices the so-called three lower counties of Delaware had on July 4, 1776?

"A I am not sure I know all three choices. I believe one was union with Pennsylvania, one was union with Maryland, and another was to form the State of Delaware.

"Q You say one was union with Pennsylvania, one was union with Maryland, and one choice was to form the State of Delaware?

"A Yes.

"Q I presume that another choice was that these counties could have insisted that they be individual states?

"A I suppose they could, yes."

"The United States of America;" as an entity, existed before the Constitution; the quoted title was given by Art. I of the Articles of Confederation. The United States of America had contracted alliances, waged and won a war, and made treaties, well before George Washington was inaugurated President under the Constitution at New York on April 30, 1789. Contrariwise, despite the circumstance that they termed themselves a "government" and a Colony, the Three Lower Counties did not become a formal political unit in fact until the Constitution of September 20, 1776, was adopted. This latter conclusion accords with the view of modern historians. See Cochran and Andrews, eds., *Concise Dictionary of American History* (1962), *s.v.* Delaware.

Consequently, for the political scientists to generalize (*One Man-One Vote*, 9) that "Counties, by contrast, were never independent or sovereign," is simply to demonstrate anew the inherent fallibility of generalizations—and, perhaps, of political scientists as a group.

Turning to the terms of the Delaware Constitution of 1776, the instrument that created "The Delaware State," we find that, in all but one vital respect, the new government differed but little from the old: its legislature was was bicameral, to supply the lack of a second house—as we have pointed out, the Three Lower Counties never had a council. The result was that, whereas in other States that created new governments when Independence came the legislatures had greatly increased in power at the expense of the former colonial (and hence, except in Connecticut and Rhode Island, *royal*) governors, in Delaware it was a sufficient check to divide the legislature and have the two parts curb each other. Cf. H. Clay Reed, *The Delaware Constitution of 1776*, *supra*, 26-27. And to remove all taint of monarchy, the new executive was named "A President, or Chief Magistrate" (Del. Const. 1776, Art. 7; 1 Thorpe 563). Interestingly enough, the Delaware Con-

stitution of 1776 "was the first to be written by any State through a device now generally considered correct, the election of a special convention for that purpose," Munroe, *supra*, 84.

In the Delaware Constitution of 1776, as well as in those later adopted, in 1792 and in 1831, the three counties were equally represented in the State Legislature, each with three members in the upper house, called first the Council and then the Senate, and each having seven representatives in the lower house, called first the House of Assembly and then the House of Representatives.

As has been shown above, pp. 15-16, it was 1897 before any Delaware Constitution deviated from the pattern of equal legislative representation for each county in both houses. In that year, by Art. II, §2 of the Constitution then adopted (J.S. App. A71-A75), the State was divided into 17 Senatorial and 35 Representative Districts. Five Senatorial Districts and ten Representative Districts each were assigned to Sussex County, to Kent County, and to "rural" New Castle County—i.e., outside the City of Wilmington—while Wilmington was assigned two Senatorial and five Representative Districts (PTO ¶¶ C4-5). The debates in the 1897 Constitutional Convention show that this plan represented a compromise (PTO, ¶10).

The 1963 amendment, which became effective on January 17, 1963, see *Opinion of the Justices*, 190 A. 2d 519, resulted in the addition of one representative to each of two Representative Districts in Wilmington, one representative to one such District in rural New Castle County, two representatives to two such Districts, and three representatives to another. It resulted in no changes in either Kent or Sussex Counties, so that the net result was to add 10 representatives from New Castle County to the House of Representatives; this came to 45 Representatives in all. In the Senate, the 1963 amendment resulted in each County having seven Senators. The existing Senatorial Districts

were retained intact, while the two additional Senators for each of Kent and Sussex Counties were to be elected by half of each county at large. See *supra*, pp. 8-9.

And, as has also been shown in detail, pp. 15-16, *supra*, the Delaware counties that created "The Delaware State" in September 1776 have continued to be strong governmental units that still exercise many governmental functions.

The foregoing detailed historical review of the formation of Delaware as a State, based as it is upon original documents, demonstrates that in Delaware the Counties made the State, and not—as may or may not have been true elsewhere—*vice versa*. Consequently one of the stock arguments currently being made against area representation is one house of a State legislature is wholly inapplicable when sought to be applied to Delaware.

After June 15, 1776, the Delaware Counties were the loosest kind of federation, lacking any executive as such, lacking even any charter or frame of government, joined only in an assembly composed of an equal number of delegates from each of them. The result was that sovereignty necessarily resided in each of the three constituent units. Moreover, contemporaneous references to them in the Journals of the Continental Congress and in the writings of the delegates to that body as—in variant forms—"the three lower counties on Delaware," make it plain that American statesmen of the Revolutionary period never regarded the Lower Counties as constituting an indivisible, unitary body. Significantly, the references are always to the counties *on* or *upon* Delaware, never to the counties *of* Delaware. Not until the three Delaware Counties, each sending ten delegates to a convention, framed a Constitution in September 1776, was "The Delaware State" created as a formal political unit.

Thus, whatever may be the case elsewhere, the Federal analogy is fully applicable to, and indeed was anticipated by, Delaware. Just as the several States, joined together under the Articles of Confederation, formed the present Federal Union in which each State, regardless of size, has equal representation in the Senate, so the Three Lower Counties upon Delaware, much more loosely linked, without any real executive head, without even any charter or instrument of government to allocate or distribute their powers, and with an autonomous Assembly in which each county had had equal representation from the very beginning as the only nexus between them, formed a State in September 1776 in both houses of whose legislature, under successive Constitutions for more than a century and a quarter, each county was equally represented.

To argue, as the appellees did below, and as the Solicitor General argues as *amicus curiae* in No. 29 and related cases, that equal county representation in the Delaware Senate under the 1963 amendment to the Delaware Constitution now violates the Equal Protection Clause, is to do violence not only to history but also to Delaware tradition and to the very essence of American Federalism.

The presiding judge below disposed of the foregoing historical facts duly laid before him at the trial (Del. App. 12a-50a), not on the footing that they were inaccurately set forth, either in detail or by way of emphasis, but simply on the ground (J. S. App. A45) that while "history must be deemed to deserve a little more courtesy than a mere distant bow," it was entitled to "no submissive genuflexion." What this amounts to, in plain English, is that the district court baldly brushed aside any and all Delaware history that it deemed inconsistent with its own blueprint for Delaware's future.

Sincock *et als.* for their part boldly assert (M/A 9-10) that "Delaware history is replete with the rejection of the county sovereignty argument and its concurrent Federal

analogy''—and then quote two two-sentence passages from the *Debates and Proceedings of the Constitutional Convention of the State of Delaware, 1896-1897*. Inasmuch as these particular *Debates and Proceedings* extend to no less than 3472 printed pages by actual count, exclusive of the index, it will readily be apparent that the word ''replete'' in the assertion just quoted reflects optimism rather than accuracy.

The further suggestion of Sincock *et als.* (M/A 9), that since Delaware in 1897 departed slightly from equal county representation in the Senate, it was no longer free under the Federal Constitution to return to it in 1963, is too reminiscent of a child's game of forfeits to be taken seriously.

II. ADOPTION BY A STATE OF THE FEDERAL PLAN FOR THE COMPOSITION OF ITS LEGISLATURE, WHEREBY ONE HOUSE IS APPORTIONED BY POLITICAL SUBDIVISIONS RATHER THAN BY POPULATION, DOES NOT NOW, AND AS DEMONSTRATED BY CONTEMPORANEOUS CONGRESSIONAL LEGISLATION NEVER DID, VIOLATE THE EQUAL PROTECTION CLAUSE

It is the fact, fully documented below, that the Reconstruction Congresses closest in time to the drafting, submission, and ratification of the Fourteenth Amendment's Equal Protection Clause, and which imposed ratification of that Amendment—and of that Clause—as a prerequisite to the readmission of the former Confederate States, did not hesitate to readmit several such States whose new constitutions did not require both houses of their legislatures to be apportioned according to population, in two instances approving constitutions providing for county representation in their senates that resulted in population disparities of between 5 and 6 to 1 in their senatorial districts.

Yet in the other State cases now pending here it is contended, as it was held in this case below, that the Equal Protection Clause prohibits a State from modeling its legislature on the Federal pattern, and that while weight

may be given in apportioning one legislative house to factors other than population, the population disparities in the other house must not be too striking.

Those views have here the weighty support of the United States as *amicus curiae* in all of the other State cases (Nos. 20; 23, 27, & 41; 29; 69), and can muster in their favor some eleven State and Federal decisions (see U.S. Br. A.C., No. 29, pp. 50-51; cf. *id.*, pp. 26-28), including the final opinion below in the present case (J.S. App. A16-A67).

But this apparent weight of numbers reflects, not any reasoned and documented view, for it is nowhere documented, but rather a frightening example of *communis error fecit jus*. For, in not a single one of those cases, either in this one or in any of the others, did the courts make the slightest effort to ascertain the views of those who drafted the Equal Protection Clause.

Moreover, the United States, which has favored the Court with copious excerpts from the records of the Constitutional Convention and the ratification contest, as well as later reminiscences on the part of participants in both (U.S. Br. *A.C.* No. 29, App. B, pp. 1-113), and also with expressions from the writings of Jefferson and Madison regarding the apportionment of State legislatures (*ibid.*, pp. 114-118), stops with the death of Madison in 1836—and never once goes on to seek, much less quote, any expressions or actions contemporaneous with the adoption of the Fourteenth Amendment.

The result is that virtually all of the contentions made to this Court regarding the meaning of the Equal Protection Clause reflect views that are supported primarily if not wholly by the personal preferences of the writers. Certainly that was so below; the prevailing opinion of the district court simply reads into the Equal Protection Clause what the author judge would have placed there as an original proposition.

We think it too plain for anything beyond mere statement that this Court should not undertake to adjudicate the reach of the Equal Protection Clause in the present group of State reapportionment cases without examining in detail the contemporaneous Congressional construction of that Clause by the Reconstruction Congresses, which so carefully, see *United States* v. *Florida*, 363 U.S. 121, scrutinized the new constitutions of the formerly seceded States before readmitting them once more to the Union.

We likewise think it too plain for anything beyond mere statement that those contemporary materials, from 1868 to 1870, shed far more light on the meaning of the Equal Protection Clause, which dates from 1866, than do the expressions from 1776 to 1836, with which the brief of the United States as *amicus curiae* in No. 29 stops.

And we are confident that, when the contemporaneous legislative materials are examined, materials that represent an exercise of Congressional enforcement of the Fourteenth Amendment under Section 5 thereof (J.S. App. A71), it will become crystal clear that the Reconstruction Congresses that were so busily and indeed bitterly engaged in imposing that Amendment on the former Confederate States found in such of their constitutions as provided for a State legislature on the Federal pattern no inconsistency whatever with the Equal Protection Clause.

A. Contemporaneous Congressional legislation readmitting the former Confederate States establishes conclusively that State constitutions providing for senates apportioned on an area basis were never deemed to violate the Equal Protection Clause

Inasmuch as every reapportionment contention ever made rests on the Equal Protection Clause of the Fourteenth Amendment, a provision that was submitted to the States in 1866 (Joint Res. of June 16, 1866, No. 48, 14 Stat. 358) and proclaimed a part of the Constitution in July

1868 (Proc. No. 11, July 20, 1868, 15 Stat. 706; Proc. No. 13, July 28, 1868, 15 Stat. 708), we must look for the intentions of its draftsmen in the records of these years. We cannot rely on what was said or done by those who framed the Constitution and the Bill of Rights, because, very obviously, the last of the Framers had departed this life long before the adoption of the post-Civil War Amendments, particularly the Fourteenth, that so drastically altered the distribution of governmental power between the Nation and the States. Nor can we properly rely on those who, in disregard of the views of the Framers of the Fourteenth Amendment, seek to read their own current political predilections into the generalized language of the Equal Protection Clause.

No judge or lawyer anywhere in the land would undertake to construe the Constitution of the United States without examining the *Records of the Federal Convention* or Elliot's *Debates;* why then should anyone even attempt to interpret the Fourteenth Amendment without reference to the *Congressional Globe* or to Congressional documents?

First. Eleven States seceded from the Union in the Civil War. Tennessee, the first one restored, by the Joint Resolution of July 24, 1866, No. 73, 14 Stat. 364, escaped Reconstruction, which was duly visited on the remaining ten by the Acts of March 2, 1867, c. 153, 14 Stat. 428, March 23, 1867, c. 6, 15 Stat. 2, and July 19, 1867, c. 30, 15 Stat. 14.

The basic Reconstruction Act of March 2, 1867, declaring illegal the existing State governments in the remaining ten former Confederate States, and substituting military governments by districts in lieu thereof, provided in its Section 5 (14 Stat. at 429) that none of the ten would be readmitted until they first ratified the then pending Fourteenth Amendment. The second Reconstruction Act, of March 23, 1867, provided for the calling of conventions

at which the several States involved would draft new constitutions.

Thereafter, in June 1868, before the Fourteenth Amendment had become a part of the Constitution on any footing (compare the Proclamations of July 20 and 28, 1868, *supra*, 15 Stat. 706 and 708), the Fortieth Congress provided for the readmission of Arkansas, which had already ratified that Amendment (Act of June 22, 1868, c. 69, 15 Stat. 72), and, a few days later, provided for the readmission of six more former Confederate States then undergoing Reconstruction, on condition that each ratify the Fourteenth Amendment. Act of June 25, 1868, c. 70, 15 Stat. 73 (Alabama, Florida, Georgia, Louisiana, North Carolina, South Carolina). Two years later, during the Forty-first Congress, provision was made for the readmission of the remaining three former Confederate States. Act of Jan. 26, 1870, c. 10, 16 Stat. 62 (Virginia); Act of Feb. 23, 1870, c. 19, 16 Stat. 67 (Mississippi); Act of March 30, 1870, c. 39, 16 Stat. 80 (Texas). Georgia, for reasons set out below, was not finally readmitted until passage of the Act of July 15, 1870, c. 299, 16 Stat. 363.

Second. (1) The new constitutions of five of the foregoing States duly provided for the apportionment of both houses of the legislature on the basis of population. Ala. Const. 1867, Art. VIII, §§1, 3 (1 Thorpe 132, 145-146); Ark. Const. 1868, Art. V, §8 (1 Thorpe 306, 310-311); Miss. Const. 1868, Art. IV, §§34, 35 (4 Thorpe 2069, 2074); N.C. Const. 1868, Art. II, §§5, 6 (5 Thorpe 2800, 2804); Tex. Const. 1868, Art. IV, §11 (6 Thorpe 3591, 3594-3595).

(2) The constitutions of three other readmitted States assigned senators by districts; the extent to which their provisions in that regard reflected population, or emphasized area primarily, or what weight they gave to each factor, does not appear from the face of the several instruments. Fla. Const. 1868, Art. XIV, ¶2 (2 Thorpe 704, 719); La. Const. 1868, Tit. II, §22 (3 Thorpe 1449, 1451-

1453); Va. Const. 1870, Art. V, §3 (7 Thorpe 3871, 3882-3883).

(3) Two of the newly admitted States adopted constitutions that plainly provided, on their face, for area representation in one house of the legislature. Georgia's constitution allowed one senator for each of 44 districts of three contiguous counties each, quite unrelated to population. Ga. Const. 1868, Art. III, §2 (2 Thorpe 822, 827-828). South Carolina adopted a constitution under which each county was entitled to one senator, the only nod to population being that Charleston County alone was allotted two senators. S.C. Const. 1868, Art. II, §8 (6 Thorpe 3281, 3286).

Third. At the time that each of the last five States was readmitted, the 1870 Census had not been taken, and the last available population figures were those contained in the Eighth Census of 1860. All too plainly, the latter could only reflect the approximate population in 1868, particularly after the dislocations caused by four years of war in four of the States whose new constitutions did not apportion their senates on a population basis; only Florida had escaped largely unscathed by military operations. But, with all their obvious deficiencies, the 1860 census figures were the only ones available to any one who in 1868 or early in 1870 sought to examine those five new constitutions with a view to ascertaining the extent of what since 1962 has been semantically characterized as "dilution" or "debasement" of voting power.

Here are the results of the correlation of the senatorial provisions of the five constitutions of former Confederate States now involved with the 1860 census figures.[9]

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[9] All of the latter are taken from *Population of the United States in 1860; compiled from the Original Returns of the Eighth Census, under the direction of the Secretary of the Interior* (Washington, 1864). The figures appear therein alphabetically by States, and the aggregate population of each county appears for each State in Table 2, "Population by Color and Condition."

Florida. Article XIV of the Florida Constitution of 1868 (2 Thorpe 704, 719), entitled "Census and Apportionment," provided as follows:

> "The legislature shall, in the year [1875], and every tenth year thereafter, cause an enumeration to be made of all the inhabitants of the state; and they shall then proceed to apportion the representation among the different counties, giving to each county one representative at large, and one additional to every one thousand registered votes therein, but no county shall be entitled to more than four representatives.
>
> "The legislature shall also, after every such enumeration, proceed to fix by law the number of senators which shall constitute the senate of Florida, and which shall never be less than one-fourth nor more than one-half of the whole number of the assembly. When any senatorial district shall be composed of two or more counties, the counties of which such district consists shall not be entirely separated by any county belonging to another district, and no county shall be divided in forming a district, and all counties shall remain as now organized unless changed by a two-thirds vote of both houses of the legislature."

Unspecific as these provisions may be, they none the less left room for large disparities as the population of the State was then distributed. Under the 1860 census, the most populous county in Florida was Leon County, with 12,343 inhabitants, and the least populous was Dade County, with only 83.

In order to ascertain the number of persons from which registered voters might be drawn, we omit all females, then still not permitted to vote, and all inhabitants under 20 years of age. This leaves 39 potential voters in Dade County, and 2952 in Leon County. Supposing lack of interest or lack of qualifications to cut registration to 60 per cent of the eligibles in each instance, this would entitle 24 voters in Dade County to one representative,

and 1771 voters in Leon County also one representative, or a ratio of 73.7 to 1.

The first Senator from Florida elected under its new constitution presented himself on June 30, 1860 (Cong. Globe, 40th Cong., 2d sess., p. 3598). A long debate ensued, not over whether the voting discrepancies in that constitution involved a denial of the equal protection of the laws to any person in Florida, but only over the question whether the Florida legislature, which had passed a resolution "adopting" the Fourteenth Amendment, had in consequence complied with the condition in the Act of June 25, 1868, *supra*, which required a "ratification." A motion to refer this weighty question to the Committee on the Judiciary was defeated (p. 3602), but it took five more printed pages of argument before the Senator-elect from Florida was permitted to be sworn (p. 3607).

The second Senator from Florida took the oath two days later without further discussion (p. 3672), while the Florida Congressman was similarly admitted following routine overnight examination of his credentials (pp. 3614, 3655).

Louisiana. Title II, Sec. 22, of the Louisiana Constitution of 1868 (3 Thorpe 1449, 1451-1453) provided for twenty-four senatorial districts, one of which was given three senators, ten of which were given two senators, and the balance one senator each.

Certain of these senatorial districts, four of which were based on a combination of representative districts in the City of New Orleans, and one of which involved a geographical division of Orleans Parish, cannot be correlated with the 1860 census figures.

Of the remainder, always dividing the population in the case of the two-senator districts to ascertain the population per senator, the most populous was the district consisting of Concordia and Avoyelles Parishes, given one

senator for 26,972 inhabitants, and the least populous the one composed of Ouachita and Caldwell Parishes, given one senator for 9560 inhabitants.

The resultant discrepancy is 2.82 to 1. Yet Louisiana's new Senators were permitted to take their oaths on July 17, 1868, without discussion, upon presentation of their credentials and of the resolution of the Louisiana legislature ratifying the Fourteenth Amendment (Cong. Globe, 40th Cong., 2d sess., p. 4151). Admission of Louisiana's Representatives was similarly routine (pp. 4186, 4213, 4215-4216).

Virginia. Article V, Sec. 3 of the Virginia Constitution of 1868 (7 Thorpe 3871, 3882-3883), provided for 40 senatorial districts, the composition of which was duly prescribed. The most populous of these districts, composed of Stafford, Spottsylvania, and Louisa Counties, showed a population in 1860 of 41,332 inhabitants; the least populous, comprising Petersburg City alone, had an 1860 population of only 18,266. Both districts suffered in the Civil War; at least equally, it is fair to assume. Even so, the resultant disparity runs 2.26 to 1.[10]

Virginia's readmission to the Union was long delayed; see Act of April 10, 1869, c. 17, 16 Stat. 40; Act of Jan. 26, 1870, c. 10, 16 Stat. 62; Randall and Donald, *The Civil War and Reconstruction* (2d ed. 1961) 619, 620-621; but the population discrepancy in its senatorial districts was never assigned from any source as the reason for such delay.

Georgia. Article III, Sec. 2 of the Georgia Constitution of 1868 (2 Thorpe 822, 827-828) provided for 44 numbered senatorial districts, each composed of three contiguous counties. District 22, composed of Bibb, Monroe, and Pike

[10] Bland County, which was formed from parts of Giles, Wythe, and Tazewell Counties in 1861 (Va. Acts 1861, c. 23, p. 45), is not reflected in the 1860 census figures; but that circumstance does not affect the figure in the text.

Counties, had the most population—42,322 inhabitants, while District 15, comprising Montgomery, Telfair, and Irwin Counties, was the least populous, with only 7409 inhabitants. This is a discrepancy of 5.7 to 1.[11]

As we indicate in detail below, the struggle over Georgia's readmission was long and bitter, and she was the last of the former Confederate States to be restored to representation in Congress. But although her constitution was meticulously examined, see *United States* v. *Florida*, 363 U.S. 121, the distribution of seats in the Georgia Senate was never one of the reasons assigned for that long delay.

South Carolina. Article II, Sec. 8 of the South Carolina Constitution of 1868 (6 Thorpe 3281, 3286) provided for a senate in which Charleston County had two senators and every other county one senator. The 1860 census showed Charleston to have a population of 70,100, or 35,050 persons per senator; the high and low among the remaining counties were, respectively, Colleton with 41,916 and Horry with 7962. This comes to a differential of 5.2 to 1.[12]

While there was some discussion regarding the seating of one of South Carolina's new Senators, the debate dealt only with asserted irregularities in his election by the South Carolina legislature (Cong. Globe, 40th Cong., 2d sess., pp.

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[11] Bartow County, a part of district 42, had been Cass County before the Civil War and appeared as such in the 1860 Census; the change of name was effected by Ga. Acts 1861, Act 97, p. 101. Certain minimal boundary changes, moving a lot or two at a time, were made in the boundaries of Telfair and Irwin Counties during the War. Ga. Laws 1862-63, No. 188, Sec. II, pp. 206-207 (two lots from Wilcox to Irwin); Ga. Laws 1864-65, No. 80, p. 81 (one lot from Telfair to Pulaski); Ga. Laws 1865-66, No. 67, p. 49 (slight readjustment of boundary between Irwin and Wilcox); Ga. Laws 1865-66, No. 68, p. 49 (one lot from Irwin to Worth).

[12] The 1860 Census shows as districts the areas redesignated in the 1868 constitution as counties. Also, Oconee County was formed by a division of Pickens District. See H.R. Ex. Doc. 291, 40th Cong., 2d sess., p. 11, notes. Neither factor varies what is said in the text.

4312, 4313-4320). South Carolina's new Congressmen were seated in completely routine fashion (pp. 4215-4216, 4254, 4499).

Texas. It may be of interest to examine the population differential among the senatorial districts of the Texas Constitution of 1868, Art. III, Sec. 11 of which (6 Thorpe 3591, 3595) purported to apportion both houses of its legislature according to population.

Article III, §§39-40 of the same instrument (6 Thorpe at 3597-3598) established 30 senatorial districts. The high in population was the first one, consisting of Chambers, Jefferson, Orange, Liberty, Hardon, Newton, Jasper, Tyler and Polk Counties; these showed in the 1860 census an aggregate population of 29,942 inhabitants. The low in population was the seventeenth senatorial district, comprising Burleson, Brazos, and Milam Counties, which together had only 13,634 persons in 1860. This is a ratio of 2.19 to 1.[13]

In Texas, as in Virginia and Mississippi, readmission was long delayed. Act of April 10, 1869, c. 17, 16 Stat. 40; Act of March 30, 1870, c. 39, 16 Stat. 80; Randall and Donald, *The Civil War and Reconstruction*, *supra*, at 621. But the reasons given were wholly independent of any asserted malapportionment in the Texas legislature alleged to violate the Equal Protection Clause.

Fourth. The suggestion of Sincock *et als.* (M/A 22) that the provisions of the new Southern constitutions were never considered by Congress is belied both by *United States* v. *Florida*, 363 U.S. 121, and by the underlying materials.

For one thing, the several constitutional provisions just analyzed were duly brought to the attention of Congress. H.R. Misc. Doc. 109, 40th Cong., 2d sess., pp. 25, 37

[13] Many Texas counties made no returns in 1860. But this circumstance does not affect the foregoing ratio.

(Florida); H.R. Ex. Doc. 281, 40th Cong., 2d sess., pp. 23, 25 (Louisiana); Sen. Ex. Doc. 54, 40th Cong., 2d sess., pp. 11-12 (Virginia); Sen. Ex. Doc. 57, 40th Cong., 2d sess., pp. 5-6 (Georgia); H.R. Ex. Doc. 291, 40th Cong., 2d sess., p. 11 (South Carolina); H.R. Misc. Doc. 82, 41st Cong., 2d sess., pp. 7-8 (Texas).

Nor was Congressional scrutiny of those provisions in any sense perfunctory, as the proviso to Section 1 of the Act of June 25, 1868, c. 70, 15 Stat. 73, bears witness:

> "* * * and the State of Georgia shall only be entitled and admitted to representation upon this further fundamental condition: that the first and third subdivisions of section seventeen of the fifth article of the constitution of said State, except the proviso to the first subdivision, shall be null and void, and that the general assembly of said State by solemn public act shall declare the assent of the State to the foregoing fundamental condition."

(For the text of the provisions that Congress required the State of Georgia to strike out of its constitution, see Sen. Ex. Doc. 57, 40th Cong., 2d sess., at pp. 14-15; and the footnotes in 2 Thorpe at 836-837.)

Thereafter, Georgia was required to ratify the Fifteenth Amendment also as a further prerequisite to readmission. Sec. 8 of the Act of Dec. 22, 1869, c. 3, 16 Stat. 59, 60.

Later when Virginia came up for readmission, Congress enacted the foregoing proviso (Act of Jan. 26, 1870, c. 10, 16 Stat. 62, 63):

> "That the State of Virginia is admitted to representation in Congress as one of the States of the Union upon the following fundamental conditions: First, That the Constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the Constitution herein recognized, except as a punishment for such

> crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said State: *Provided*, That any alteration of said Constitution, prospective in its effects, may be made in regard to the time and place of residence of voters. Second, That it shall never be lawful for the said State to deprive any citizen of the United States, on account of his race, color, or previous condition of servitude, of the right to hold office under the constitution and laws of said State, or upon any such ground to require of him any other qualifications for office than such as are required of all other citizens. Third, That the constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution of said State."

Identical provisos were included in the readmission acts for Mississippi (Act of Feb. 23, 1870, c. 19, 16 Stat. 67, 68) and for Texas (Act of March 30, 1870, c. 39, 16 Stat. 80, 81).

We turn to Georgia's long-delayed readmission and the reasons therefor; it seems most convenient to quote from a standard text (J. G. Randall and David Donald, *The Civil War and Reconstruction* [2d ed. 1961] 619, 621-622):

> "Attention now turns to the four states in which reconstruction was retarded — Georgia, Mississippi, Virginia, and Texas. In general the reason for such retardation was the reluctance of the politically active elements in those states to fulfill the terms which Congress was imposing, a reluctance which taxed the ingenuity of the Radicals in inventing heroic devices to overcome the lack of harmony between actual conditions in the South and the measures which Congress had declared to be the law of the land.
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> "As to Georgia special action by Congress was found to be necessary. It will be recalled that it was one of the six states whose admission was provided

for by act of June 25, 1868. The state government was formed, the governor inaugurated, the legislature organized, and members of both houses of the Federal Congress chosen. All these steps were deemed satisfactory by the distinguished military governor, George G. Meade, who withdrew the military forces which had been occupying the state. Subsequently, however, certain Negro members who had been elected to the legislature were denied seats, while ex-Confederates were granted seats in opposition to the reconstruction laws and the fourteenth amendment. Congress therefore passed a special act for Georgia [Act of Dec. 22, 1869, c. 3, 16 Stat. 59], excluding from the legislature all who could not qualify under the amendment and prohibiting the exclusion of any member by reason of color. Severe penalties were imposed by this act upon anyone who should take oath falsely or hinder the taking of the oaths prescribed; and the President was authorized to use military force to execute its provisions. The reorganization of Georgia was effected under military direction, a board of officers being established to 'inquire into' the eligibility of disputed members. By order of the commanding general those found ineligible by the military board were 'prohibited' from taking part in the legislature, while as to those found eligible it was prescribed that no objections be made to their participation as members. [Citing Sen. Rep. 58, 41st Cong., 2d sess., pp. 6-8.] Proceedings in Congress concerning the enforcement of the fourteenth amendment in Georgia, the organization of a further military commission to inquire into the organization of the legislature, and like matters, are too complicated to be treated here. At length, after many parliamentary difficulties, a bill to admit the state was enacted into law (July 15, 1870). [Act of that date, c. 299, 16 Stat. 363.] Senators from Georgia took their seats on February 24, 1871, representatives having been previously admitted to the lower house."

We have examined the debates on the readmission of the former Confederate States, in the 40th Congress, as well as in the 41st Congress through the completion of

legislative action on the Act of July 15, 1870, which finally readmitted Georgia. They contain neither statement nor whisper nor intimation that area representation in a State senate, even in a former Confederate State's senate, in any sense even drew into question the scope of the Equal Protection Clause of the Fourteenth Amendment whose ratification and application had been imposed as indispensable prerequisites for readmission to the Union. They do show, as this Court noted in *United States* v. *Florida*, 363 U.S. 121, that the new Southern constitutions were rigidly scrutinized by Congress, and they further show that the Federal pattern for a legislature was discussed in the course of the debates.

In the interest of convenience, we have set forth in the Appendix to this brief, *infra;* pp. 112 *et seq.*, relevant excerpts from the debates on the readmission of the former Confederate States.

Fifth. And yet, while Congress thus indicated by way of action upon the State constitutions submitted to it its contemporaneous view that the Equal Protection Clause as a matter of constitutional interpretation did not prohibit area apportionment in State senates—and in this connection it is necessary to bear in mind that Section 5 of the Fourteenth Amendment specifically provided that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article"—still when the contemporaneous sessions of Congress dealt with the same question as a matter of political desirability, they consistently provided that both legislative houses should be apportioned according to population.

Numerous territories were organized in the 1860's; in the organic act for each, it was regularly provided that both the upper house, the council, and the lower house, the house of representatives, should each be apportioned on the basis of population. We list those provisions here in chronological order.

Sec. 4 of the Act of Feb. 28, 1861, c. 59, 12 Stat. 172, 173 (Colorado Territory).

Sec. 4 of the Act of Mar. 2, 1861, c. 83, 12 Stat. 209, 210 (Nevada Territory).

Sec. 4 of the Act of Mar. 2, 1861, c. 86, 12 Stat. 239, 240 (Dakota Territory).

Act of Feb. 24, 1863, c. 56, 12 Stat. 664 (Arizona Territory; to be modeled after New Mexico, which had similarly prescribed that both houses of the territorial legislature be apportioned according to population, Sec. 5 of the Act of Sept. 9, 1850, c. 49, 9 Stat. 446, 448).

Sec. 4 of the Act of Mar. 3, 1863, c. 117, 12 Stat. 808, 809 (Idaho Territory).

Sec. 4 of the Act of May 26, 1864, c. 95, 13 Stat. 85, 87 (Montana Territory).

Sec. 4 of the Act of July 25, 1868, c. 235, 15 Stat. 178, 179 (Wyoming Territory).

The Wyoming provision, which became a law exactly one month after the Act readmitting South Carolina and Georgia with their area-apportioned State senates (*supra*, pp. 57, 58, 61-63), was as follows:

"SEC. 4. *And be it further enacted*, That the legislative power and authority of said Territory shall be vested in the governor and legislative assembly. The legislative assembly shall consist of a council and house of representatives. The council shall consist of nine members, which may be increased to thirteen, having the qualifications of voters as hereinafter prescribed, whose term of service shall continue two years. The house of representatives shall consist of thirteen members, which may be increased to twenty-seven, possessing the same qualifications as prescribed for members of the council, and whose term of service shall continue one year. An appor-

> tionment shall be made by the governor as nearly equal as practicable among the several counties or districts for the election of the council and house of representatives, giving to each section of the Territory representation in the ratio of their population, (excepting Indians not taxed,) as nearly as may be, and the members of the council and house of representatives shall reside in and be inhabitants of the districts for which they may be elected, respectively. Previous to the first election the governor shall cause a census or enumeration of the inhabitants of the several counties or districts of the Territory to be taken * * *."

The foregoing was the standard provision, enacted *verbatim* or nearly so in all the organic acts we have heretofore cited.[14]

Moreover, Congress was astute to provide for prompt reapportionment in the organized Territories. See the Act of June 20, 1864, c. 141, 13 Stat. 142 (governor authorized to reapportion both houses of the Idaho territorial legislature); Act of Feb. 21, 1871, c. 64, 16 Stat. 429 (same, in respect of legislature of Colorado Territory).

Indeed, the strongest expression of Congressional intention in respect of legislative apportionment in territorial legislatures is the Act of Feb. 21, 1871, c. 65, 16 Stat. 429, "An Act to repeal an Act of the Legislature of Wyoming Territory apportioning said Territory for Members of the

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[14] As a matter of interest, the same stock provision appeared in all the other acts organizing territories, from the close of the Mexican War through the 1850's:

Sec. 4 of the Act of Aug. 14, 1848, c. 177, 9 Stat. 323, 324 (Oregon Territory); Sec. 4 of the Act of Mar. 3, 1849, c. 121, 9 Stat. 403, 404 (Minnesota Territory); Sec. 4 of the Act of Sept. 9, 1850, c. 51, 9 Stat. 453, 454 (Utah Territory); Sec. 4 of the Act of March 2, 1853, c. 90, 10 Stat. 172, 173 (Washington Territory); Sec. 4 of the Act of May 30, 1854, c. 59, 10 Stat. 277, 278 (Nebraska Territory); Sec. 22 of the same Act, 10 Stat. at 284 (Kansas Territory).

Council and House of Representatives of the Territorial Legislature." The territorial act was "disapproved and repealed," and the Governor of the Territory was directed to effect the reapportionment.

Or, otherwise stated, while contemporaneous sessions of Congress as a matter of desirability enforced the pattern of population-apportioned upper legislative houses in the Territories, in areas that knew no traditions save those of the deer, the antelope, the buffalo, and of tribal Indians in varying stages of development, it never considered such a pattern to be a matter of constitutional compulsion for the former Confederate States, communities each of which had a substantial background of political development, and which were readmitted to the Union on the repeatedly imposed and strictly enforced condition of complete compliance with all the provisions of the Fourteenth Amendment.

Sixth. From the foregoing record of what Congress did and did not do, it is apparent that, by admitting the formerly seceded States with their new constitutions that provided for area-apportioned senates, the Congresses nearest in time to the adoption, ratification, and initial enforcement of the Fourteenth Amendment interpreted the Equal Protection Clause as not "to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States" (Holmes, J., in *Truax* v. *Corrigan*, 257 U.S. 312, 344), where such social experiments involved a State legislature constructed on the Federal pattern.

We have already, *supra*, pp. 63-67, pointed out how closely Congress scrutinized the new constitutions of the former Confederate States. Very plainly, therefore, if the Congresses that imposed such requirements had considered Georgia's plan of giving one senator to every three counties regardless of population to be violative of the Equal Protection Clause, or had similarly regarded as

contravening that Clause South Carolina's scheme of one senator for each county (with but a single exception), it would necessarily have insisted that those provisions, also, be expunged or altered. Having regard to the temper of the times, it cannot be supposed for one moment that, if the Reconstruction Congresses had ever considered area representation in one house of a State legislature to constitute a denial of the equal protection of the laws, they would ever have readmitted South Carolina, which had been first to secede and first to fire on the flag, or Georgia, which for so long proved stubborn, obdurate, and "unreconstructed." The foregoing view, we submit, is amply supported by the rationale of *United States* v. *Florida*, 363 U.S. 121.

From this it necessarily follows that the statement in *MacDougall* v. *Green*, 335 U.S. 281, 283, that "To assume that political power is a function exclusively of numbers is to disregard the practicalities of government," correctly reflects the original understanding and interpretation of the Equal Protection Clause; and that the contrary view of the court below, the holding that this Clause requires both houses of a State legislature to be apportioned according to population, represents a revelation never vouchsafed to the contemporaries of the enactment, ratification, and initial implementation of the Fourteenth Amendment.

We close this point as we began it: No court in any of the controversies involving apportionment of a State senate apparently has ever looked to contemporaneous Congressional interpretation of the Equal Protection Clause as shown by the readmission of the former Confederate States; no commentator, to our knowledge, has examined this field; and the brief filed on behalf of the United States, which relies on the comments of Jefferson and Madison, necessarily stops with their deaths in 1826 and 1836 respectively, and undertakes to argue the meaning of the Equal Protection Clause without any examination of what was said or done about that clause during the most critical years, 1866 through 1870.

B. The contrary view of the court below involves two unacceptable incongruities, first that the permanent guaranty in the Constitution of the United States of two senators to every State violates the rights under the same Constitution of the people of the more populous States, second that the principle of checks and balances written into the Constitution of the United States is unconstitutional under the same instrument because it frustrates the immediate attainment of whatever objectives a majority of the people may desire at any given time

First. As has been seen, the majority of the court below held that Delaware could not constitutionally model its legislature on the Federal pattern, whereby New Castle County, with 69% of the State's 1960 population, would elect one-third of the Senate, while Kent and Sussex Counties, with approximately 31% of the population, would elect two-thirds of the Senate (J.S. App. A43).

The brief of the United States as *amicus curiae* in No. 29 also lays down broad principles allegedly founded on the Constitution. It speaks of (U.S. Br. *A.C.* 23) "the democratic ideals of equality and majority rule," of (*id.* 26) "the principles of popular representation and majority rule" and of (*id.* 44) "the primacy of the principles of voting equality and majority rule." It asserts (*id.* 49) that "the principles of voter equality and majority rule are too vital a part of our constitutional philosophy to permit States thus to submerge them in the interest of recognizing political subdivisions," and (*id.* 60) that "Our entire history teaches the ideals of voter equality and majority rule."

We think that a comprehensive answer to all of the foregoing views is found in Judge Layton's dissent below. (J.S. App. A64-A66 [footnote omitted]):

> "With deference, I can find nothing constitutionally wrong in the make up of a State Legislature composed of a Lower House whose members are elected upon a strict population basis and an Upper House whose

members are elected in equal numbers from each County. This is the way our Federal Congress is constituted. True, the analogy between a State Legislature and the Federal Congress is not exact. For one thing, the states are sovereign while the counties are not. More importantly, under the 1963 amendment, an invidious discrimination could well be found to exist on an intra-county basis in the composition of the Senate which would necessitate a redistricting. For instance, the 4th Senatorial District of New Castle County with a population of 64,000 has one senator, while the 7th Senatorial District of the same county has 4,000. Nevertheless, while not exact, the broad analogy is clear and to my mind it is incongruous to hold that a state legislature patterned upon lines precisely similar to those of the federal system is unconstitutional because offensive to the Equal Protection Clause of the Federal Constitution.

* * * * *

"As a practical matter, no more glaring example of 'invidious discrimination' can be found than in general elections where a voter in Nevada, having a population of approximately 285,000, casts a vote for a United States Senator while at the same time a voter in the State of New York, having a population of 16,750,000, casts his vote for a United States Senator.

"Since the so-called federal system has withstood 175 years of stress and strain in the national political arena, I can see no valid reason for interfering with the composition of a State Legislature modeled exactly on it."

The United States also, throughout its several briefs *amicus* in the related State apportionment cases, stresses the circumstance that a minority of the voters in the several States there involved can elect a majority of each State senate. E.g. (U.S. Br. *A.C.*, No. 29, pp. 47-48), "In Maryland, as a result of the apportionment of equal votes to each county (with additional senators for Baltimore City), one-seventh of the people of Maryland elect a

majority in the State Senate." Again (U.S. Br. *A.C.*, No. 20, p. 35), "Under the new apportionment, 38 percent of the citizens [of New York] will elect a majority of the Senate * * *." Further (U.S. Br. *A.C.*, No. 69, p. 47), "Under the 1962 statute, 41.1 percent of the population [of Virginia] elects a majority of the Senate * * *." Finally (U.S. Br. *A.C.*, Nos. 23, 27, 41, p. 41), "A majority of the senators would come from districts containing 27.6 percent of the people [of Alabama]."

The fact of the matter is that the built-in provisions of the Federal system produce far greater disparities.

The Constitution provides (Art. II, Sec 3; Art. XVII) that "The Senate of the United States shall be composed of two Senators from each State," and further provides (Art. V) "that no State, without its Consent, shall be deprived of it's equal Suffrage in the Senate." These clauses guarantee for all time the Federal adjustment between large and small states—the major problem in the Convention that informed commenators have termed "The Great Compromise" (Farrand, *The Framing of the Constitution* (1913) c. VII; Charles Warren, *The Making of the Constitution* (1937 ed.) pt. Two, c. V).

Under this Federal principle, under this Federal system, a majority of the Senate is elected by a very small minority of the population.

Today there are 50 States, so that 51 senators constitute a majority of the Senate. That majority can be composed of the two Senators from each of the 25 least populous States plus one Senator from the next least populous.

In 1960, the population of the 25 least populous States aggregated 27,985,146. Half of the population of the 26th least populous State, was 1,267,617. Otherwise stated, 29,252,763 people can elect a majority of the Senate. This is 16.31% of the entire 1960 population of 179,323,175.

Thus less than one-sixth of the people of the United States elect a majority of the Senate of the United States.[15]

Very plainly, this is on a par with the Maryland Senate disparity of which the brief of the United States complains, far less than the disparities in New York, Virginia, and Alabama which that brief also challenges, and substantially the same as the condition in Delaware that the court below struck down as invidiously discriminatory.

The view held by the presiding judge of the court below for the concept of Federalism may be judged by the circumstance that in a revealing witticism he equated "The Great Compromise" of the Federal Convention with the invention of the queue (J.S. App. A44, n. 17).

More significantly, the arithmetical analysis of the operation of Federalism in the Senate of United States under the 1960 census demonstrates that the much vaunted principles of voting equality and majority rule evoked by the brief of the United States are not only no part of the philosophy of our Constitution but are in fact rejected by it—and guaranted against ever being adopted.

Indeed, to approve the views of the court below in respect of the allegedly invidious discrimination produced by the Federal pattern, or to espouse as a constitutional principle the views advanced here on behalf of the United States, would involve this incongruity, that the provision of the United States Constitution forever protected against alteration, which guarantees to every State however small

[15] The least populous States in 1960, in ascending order of population, were (1) Alaska, (2) Nevada, (3) Wyoming, (4) Vermont, (5) Delaware, (6) New Hampshire, (7) North Dakota, (8) Hawaii, (9) Idaho, (10) Montana, (11) South Dakota, (12) Rhode Island, (13) Utah, (14) New Mexico, (15) Maine, (16) Arizona, (17) Nebraska, (18) Colorado, (19) Oregon, (20) Arkansas, (21) West Virginia, (22) Mississippi, (23) Kansas, (24) Oklahoma, (25) South Carolina, and (26) Connecticut.

equal representation in the Senate of the United States, simultaneously constitutes a denial of the equal protection of the laws to the people of the most populous States. And this incongruity is underscored by the circumstance that a denial of equal protection may, when the discrimination is sufficiently unjustifiable, constitute a denial of due process as well. *Bolling* v. *Sharpe*, 347 U.S. 497.

It necessarily follows that the views of the court below, here supported by the United States as *amicus curiae* in the other State reapportionment cases, involve the unacceptable paradox that the United States Constitution carries within itself the forever imbedded cancer of unconstitutional discrimination.

Second. Unchecked and unrestrained majority rule is not the pattern of the Constitution of the United States; that instrument was fashioned on the view that the principle of checks and balances constituted a wiser pattern for what the Great Chief Justice on a memorable occasion called "a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs" (*M'Culloch* v. *Maryland*, 4 Wheat. 316, 415).

A system of checks and balances places a significant brake on unrestrained majority rule. Simply to mention some of the more obvious and universally familiar features of the Constitution of the United States, a Senate representing a minority of the population can refuse to pass a measure overwhelmingly adopted by a House of Representatives apportioned according to population; a single individual, indirectly elected—the President—can veto a measure passed by both houses of Congress; and a bare majority of this Court can and frequently does declare invalid and refuse enforcement to a measure duly enacted by large majorities of both houses of Congress and enthusiastically approved by the President.

These are fundamentals, but it is well to recall them in the face of the expressions now being pressed on the Court, already quoted, about "the democratic ideals of equality and majority rule," and "the primacy of the principles of voter equality and majority rule." The fact of the matter is that those principles are demonstrably not the principles on which the Constitution of the United States was constructed.

In this connection, we think it well to remember that a pure example of instantaneous response to the will of a momentary majority in a particular community that is unchecked by any restraints whatever is a lynching.

Mr. Justice Holmes once said (*Collected Legal Papers* (1921) 291, 292-293) that "at this time we need education in the obvious more than investigation of the obscure." It seems appropriate, therefore, to point out what indeed we may be in some danger of forgetting, that the protection of minority rights and the enforcement of civilized processes of law, both characteristic and pervasive features of what we proudly regard as the American way of life, are such only because the Constitution under which we live is based upon checks and balances. Contrariwise, minorities have no enforceable rights in any society constructed on the theory of undiluted majoritarianism.

Moreover, we cannot forbear to remark that what is so paradoxical and so incongruous about the position of Sincock *et als.* here, about the holding below, and about the arguments addressed to this Court by the United States, is that each invokes the checks-and-balance machinery of judicial review in order to remove checks and balances from State governments in the name of asserted (U.S. Br. *A.C.*, No. 29, p. 30) "fundamental ideals of American political life."

We are confident that this Court will not support the inescapable constitutional incongruities that affirmance of the judgment below will necessarily involve.

C. This Court's experience with erecting economic philosophies into constitutional absolutes under the Due Process Clause stands as a solemn warning against now erecting political philosophies into similar constitutional absolutes under the Equal Protection Clause

While, for the reasons already set forth, we think that the checks-and-balances contentions of New Jersey and 14 other States in their brief *amicus* in No. 29 rest on distinctly sounder historical and constitutional grounds than do the exhortations advanced on the behalf of the United States in that case and in the other causes involving State apportionment (Nos. 20, 23, 27, 29, 41, and 69), we are convinced that the resultant contest between competing political philosophies is not one appropriate for resolution here.

In our view, neither the question whether the principle of unrestrained majority rule is better or wiser than the system of checks and balances, nor the question whether State governments can be distinguished from the Federal government on grounds going to the facts underlying the formation of each (U.S. Br. *A.C.*, No. 29, pp. 73-82), are any more appropriate for judicial resolution on the footing of constitutional interpretation than the question whether it is socially beneficial to regulate hours of labor (cf. *Lochner* v. *New York*, 198 U.S. 45, with *Muller* v. *Oregon*, 208 U.S. 412), whether it is desirable to fix minimum wages (cf. *Adkins* v. *Children's Hospital*, 261 U.S. 525, with *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379), whether it is wise to prohibit child labor (cf. *Hammer* v. *Dagenhart*, 247 U.S. 251, with *United States* v. *Darby*, 312 U.S. 100), or whether it is in the public interest to regulate optometrists (*Williamson* v. *Lee Optical Co.*, 348 U.S. 483) or to prohibit altogether the practice of naturopathy (*Dantzler* v. *Callison*, 352 U.S. 939; *Hitchcock* v. *Collenberg*, 353 U.S. 919).

Only last Term this Court reviewed at length the basic fallacy underlying the decisions of another age that

erected judgments regarding social and economic desirability into immutable constitutional principles. The quotation that follows is from *Ferguson* v. *Skrupa*, 372 U.S. 726, 729-732 (footnotes omitted).

> "Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. In this manner the Due Process Clause was used, for example, to nullify laws prescribing maximum hours for work in bakeries, *Lochner* v. *New York*, 198 U.S. 45 (1905), outlawing "yellow dog" contracts, *Coppage* v. *Kansas*, 236 U.S. 1 (1915), setting minimum wages for women, *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923), and fixing the weight of loaves of bread, *Jay Burns Baking Co.* v. *Bryan*, 264 U.S. 504 (1924). This intrusion by the judiciary into the realm of legislative value judgments was strongly objected to at the time, particularly by Mr. Justice Holmes and Mr. Justice Brandeis. Dissenting from the Court's invalidating a state statute which regulated the resale price of theatre and other tickets, Mr. Justice Holmes said,
>
> > 'I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.'
>
> And in an earlier case he had emphasized that, 'The criterion of constitutionality is not whether we believe the law to be for the public good.'
>
> "The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the

original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, 'We are not concerned . . . with the wisdom, need, or appropriateness of the legislation.' Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.' It is now settled that States 'have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.'

"In the face of our abandonment of the use of the 'vague contours' of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise, reliance on *Adams* v. *Tanner* is as mistaken as would be adherence to *Adkins* v. *Children's Hospital*, overruled by *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937). Not only has the philosophy of *Adams* been abandoned, but also this Court almost 15 years ago expressly pointed to another opinion of this Court as having 'clearly undermined' *Adams*. We conclude that the Kansas Legislature was free to decide for itself that legislation was needed to deal with the business of debt adjusting. Unquestionably, there are arguments showing that the business of debt adjusting has social utility, but such arguments are properly addressed to the legislature, not to us. We refuse to sit as a 'superlegislature to weigh the wisdom of legislation,' and we emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' Nor are we able or willing to draw lines by calling a law 'prohibitory' or 'regulatory.' Whether the legislature takes for its textbook Adam Smith,

> Herbert Spencer, Lord Keynes, or some other is no concern of ours. The Kansas debt adjusting statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas."

There is, happily, no present danger of a reversion to the earlier standards of construing the Due Process Clause on the basis of "our own personal economic predilections" (Stone, J. in *Morehead* v. *Tipaldo*, 298 U.S. 587, 633).

But there is grave danger in the position of those now urging the Court to write their political theories into the Equal Protection Clause in order to strike down systems of State government simply because those duplicate the Federal pattern and embody the Federal Convention's concepts of checks and balances. Indeed, the danger now faced is a more serious one, because the doctrine asserted by the district court in this case and espoused by the United States in the several related State apportionment cases would mark a sharp and sudden break with the past, would be a drastic revision of basic constitutional principles; and would constitute the most blatant kind of constitutional revision by judicial fiat.

Indefensible as were the rigid and doctrinaire interpretations of the Due Process Clause that reached their apogee in the universally criticized and short-lived case of *Morehead* v. *Tipaldo*, 298 U.S. 587, at least they were reached gradually and on a case-to-case basis, so that even the most extreme Due Process decisions were the product of a scalpel and not of a meat-axe.

As early as *Davidson* v. *New Orleans*, 96 U.S. 97, 104, the Court said of cases arising under the Fourteenth Amendment that "there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for

decision shall require, with the reasoning on which such decisions may be founded."

Similarly, in his classic dissent in *Southern Pac. Co.* v. *Jensen*, 244 U.S. 205, 221, Mr. Justice Holmes said, "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say, 'I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court.'"

Even when the case-to-case approach led to unsupportable results, at least the constitutional process had been one of slow accretion. Compare Jackson, J., concurring in *Douglas* v. *Jeannette*, 319 U.S. 157, 181: "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added. So it was with liberty of contract, which was discredited by being overdone."

Here, however, it is proposed, in one fell swoop, without the slightest preliminary, as a matter of first impression, and without any history of prior adjudication, that this Court adopt an interpretation of the Equal Protection Clause in respect of the permissible design of State legislatures that will reverse with a single stroke of the pen the diametrically opposite interpretation placed on that Clause by the Congresses nearest in time to its drafting, adoption, ratification—and enforcement.

We have shown, *supra* Point IIA, how the Reconstruction Congresses, after imposing as a condition to the readmission of the formerly seceded States their prior ratification of the Fourteenth Amendment, and after scrutinizing most carefully the new constitutions those States submitted in compliance with that condition, readmitted two former Confederate States whose constitutions on their face adopted the Federal pattern of area repre-

sentation in one house of the legislature, and whose senates in consequence reflected population disparities of between 5 and 6 to 1.

The court below held, and Sincock *et als.* and the United States urge that this Court now decide, 95 years later, that the Reconstruction Congresses did not understand their own handiwork, and that, without any intervening judicial construction, the 1868 Congressional interpretation be squarely rejected, with the result that in 1963 Delaware is held to have practiced invidious discrimination against its citizens when, following the procedures prescribed by its fundamental law, it refashioned its legislature on the Federal pattern.

No more bold or bald proposition has ever been submitted to this Court. For the arguments of Sincock *et als.* and of the United States ask that the Constitution of the United States be amended, not in the manner prescribed by Article V, not in consequence of a long series of decisions that have demonstrated the infirmities of earlier decisions, cf. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 and *Graves* v. *O'Keefe*, 306 U.S. 466, but simply by fiat—to accord with their newly vouchsafed revelations as to what they would like the Constitution to mean as an original proposition if they were themselves to fashion it today.

But it is suggested by Sincock *et als.* that the district court here (M/A 20) "had before it the debasement of the Civil Rights of the plaintiffs"—capitalization in the original—and, on behalf of the United States, that (U.S. Br. *A.C.*, No. 29, p. 66) "where civil liberties are involved, far more than a merely intelligible classification is required. * * * In dealing with personal liberty the legislature may not draw distinctions that would support differences in taxation or social legislation."

Thus the argument of the United States (*id.*, pp. 65-70) seeks to narrow substantially, in this case as well as in the

related ones from other States, the normal range of classifications allowable under the Equal Protection Clause.

There are several answers to these contentions.

First. The United States says (*id.* p. 69):

> "In *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152, note 4, Mr. Justice Stone raised the question 'whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.'"

Not only is this a misquotation—the original sentence begins with the words, "It is unnecessary to consider now whether legislation which restricts," &c.—but the much-discussed *Carolene* footnote, which had a checkered career not necessary to detail at this juncture, is now no longer law. Currently no provision of the Constitution enjoys preferences over any other. See *Ullmann* v. *United States*, 350 U.S. 422, 428-429, where this Court said (footnote omitted):

> 'As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion. It is appropriate to read the conviction expressed in a memorable address by Senator Albert J. Beveridge to the American Bar Association in 1920, a time when there was also manifested impatience with some of the restrictions of the Constitution in the presumed interest of security. His appeal was to the Constitution—to the whole Constitution, not to a mutilating selection of those parts only which for the moment find favor. To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution.'"

Second. The cases cited on behalf of the United States are hardly comparable in any sense to the ones now before the Court. E.g., *Skinner* v. *Oklahoma*, 316 U.S. 535, where

the distinction between larceny and embezzlement was held insufficient to justify sterilizing an individual who had committed one offense but not the other; *Griffin* v. *Illinois*, 351 U.S. 12, holding that poverty is not a sufficient reason for denying a transcript to an indigent appellant; *Oyama* v. *California*, 332 U.S. 633, and *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410, where thinly veiled discriminations based on Oriental ancestry were struck down; and *Yick Wo* v. *Hopkins*, 118 U.S. 356, where the ordinance baldly prohibited the licensing of all laundries operated by Chinese nationals.

These decisions are hardly authority, even when they involve dicta that "the political franchise of voting * * * is regarded as a fundamental political right, because preservative of all rights" (*Yick Wo* v. *Hopkins*, 118 U.S. at 370), for the proposition that a particular pattern of representation is violative of the Equal Protection Clause unless it conforms to the current ideals of Sincock *et als.* After all, the Delaware election officials who are appellants in this case have in no sense deprived Sincock *et als.* of the right to vote. The present appellees are entirely free to vote in the 1964 general election, as indeed they were free to vote in the 1962 and earlier general elections. What is involved is the question whether the Equal Protection Clause is to be rewritten simply because their votes may carry a lesser weight in the Delaware General Assembly; or, more specifically phrased, whether Sincock *et als.* have been denied the equal protection of the laws because their votes have in the composition of the Delaware Senate the weight of that of a citizen of California rather than of one from Alaska in the composition of the United States Senate.

Very plainly, the cases cited by the United States shed no light whatever on the resolution of that question.

Third. The basic fallacy in the effort of the United States to narrow the normal application of the Equal

Protection Clause in these cases is that by verbalizing the issue into semantically appealing catchwords such as "personal liberty and political right" (U.S. Br. *AC.*, No. 29, p. 66), "civil liberties" (*ibid.*), "equality of political rights" (*id.* p. 68), "the right to fair participation in one's own government" (*ibid.*), and "the right to equal representation" (*id.*, p. 69), the real problem is distorted and concealed.

That problem is whether a State of the Union is to be limited in its choice of an organic structure of government by the "vague contours" of the Equal Protection Clause (cf. Holmes, J., in *Adkins* v. *Children's Hospital*, 261 U.S. 525, 568) so as "to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States" (cf. Holmes, J., in *Truax* v. *Corrigan*, 257 U.S. 312, 344).

A State of the Union as such can hardly be said to have a vital, fundamental interest in sterilizing particular kinds of criminals (*Skinner* v. *Oklahoma*, 316 U.S. 535) or in denying indigents free transcripts on appeal (*Griffin* v. *Illinois*, 351 U.S. 12) or in denying economic equality to particular classes of aliens (*Oyama* v. *California*, 332 U.S. 633; *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410; *Yick Wo* v. *Hopkins*, 118 U.S. 356). But a State of the Union has a large and mighty interest in determining how its own government shall be constituted and constructed. Such an interest cannot properly be minimized by attaching the currently popular catchwords of liberties and rights to the contentions of individuals in that State whose preference is for another determination of its organic structure.

It did not need the acknowledgment of error permeating the opinion in *Ferguson* v. *Skrupa*, 372 U.S. 726, to warn against the unwisdom of fashioning particular political philosophies into rigid and immutable interpretations of

the Constitution. Fifteen years before *Ferguson* v. *Skrupa*, the Court prophetically declared in *MacDougall* v. *Green*, 335 U.S. 281, 284:

> "It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. The Constitution—a practical instrument of government—makes no such demands on the States."

Just as the Court does not now strike down under the Due Process Clause laws that may be either unwise or incompatible with a particular economic or social philosophy, so long as such laws do not run afoul of some specific constitutional prohibition, so the Court should not now strike down under the Equal Protection Clause State constitutional provisions for apportionment simply because those may be either unwise or incompatible with a particular political philosophy, so long as such State constitutional provisions do not run afoul of some specific Federal constitutional prohibition.

Surely the generalized command that no State shall "deny to any person within its jurisdiction the equal protection of the laws" does not of its own force prohibit a State from fashioning its legislature on the Federal model. And surely it would be more than doctrinaire, it would be purely arbitrary, now suddenly to write into the Equal Protection Clause an interpretation that is diametrically opposed to the contemporaneous construction placed upon it by the Congresses nearest in time to the drafting and adoption of that Clause, when submission thereto was imposed as a condition precedent to the readmission of the former Confederate States.

III. THE APPORTIONMENT OF THE DELAWARE GENERAL ASSEMBLY EFFECTED BY THE 1963 AMENDMENT TO THE DELAWARE CONSTITUTION IS ENTIRELY CONSISTENT WITH WELL-SETTLED INTERPRETATIONS OF THE EQUAL PROTECTION CLAUSE

A. The Equal Protection Clause does not strike down classifications that have a reasonable basis even though a court as an original proposition might be able to devise other classifications that may seem more logical or symmetrical

It seems worthwhile, in view of the opinion of the district court on the scope of the Equal Protection Clause and the arguments now made here in support of that opinion, to consider at greater length than might otherwise be necessary just what this Court has said concerning the proper application of that Clause. For the importance of this and of the related cases recall the comment made in *Sanitary District* v. *United States*, 266 U.S. 405, 425: "But cost and importance, while they add to the solemnity of our duty, do not increase the difficulty of decision except as they induce argument upon matters that, with less mighty interests, no one would venture to dispute."

Here are the Court's most recent pronouncements on the scope and proper interpretation of the Equal Protection Clause:

(1) *McGowan* v. *Maryland*, 366 U.S. 420, 425-426:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

(2) *Morey* v. *Doud*, 354 U.S. 457, 463-464:

"In determining the constitutionality of the Act's application to appellees in the light of its exception of American Express money orders, we start with the established proposition that the 'prohibition of the Equal Protection Clause goes no further than the invidious discrimination.' *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489. The rules for testing a discrimination have been summarized as follows:

> '1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79.

To these rules we add the caution that 'Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.' *Louisville Gas Co.* v. *Coleman*, 277 U.S. 32, 37-38; *Hartford Co.* v. *Harrison*, 301 U.S. 459, 462."

(3) *Goesaert* v. *Cleary*, 335 U.S. 464, 466:

"The Constitution in enjoining the equal protection of the laws upon States precludes irrational discrimination as between persons or groups of persons in the incidence of a law. But the Constitution does not re-

quire situations 'which are different in fact or opinion to be treated in law as though they were the same.' *Tigner* v. *Texas*, 310 U.S. 141, 147.'

With those settled standards before us as a yardstick, we turn to the basic pattern of apportionment for the General Assembly effected by the 1897 Delaware Constitution (J.S. App. A71-A75) as amended in 1963 (J.S. App. A77-A81); the latter became effective on January 17, 1963. *Opinion of the Justices*, 190 A. 2d 519.

That pattern followed the Federal system of a Senate in which each constituent of the political union is equally represented, and a House of Representatives apportioned according to population. Specifically, each County was assigned seven senators, just as each State of the Union is entitled to two United States Senators, while the changed population of the State since 1897 was recognized by increasing the number of Representatives in such a manner that there will now be 25 instead of 15 to be elected by New Castle County. The City of Wilmington will now have 7 Representatives instead of 5, while rural New Castle will have 18 representatives instead of 10 as formerly provided.

Passing for the moment the details of this pattern, which we discuss fully below, we submit that the reapportionment effected by the 1963 amendment has a perfectly rational basis, is patterned on institutions that are the very warp and woof of American life, and reflects the fact that, just as the United States was formed by a union of States, so Delaware was formed by a union of Counties.

Still restricting ourselves to the major features of the 1963 reapportionment, it is true that the two lower counties, Kent and Sussex, have a greater proportionate representation in the Delaware Senate than does New Castle County. Similarly, Alaska and Nevada have a greater proportionate representation in the United States Senate than do New York or California. But surely none but emotional doc-

trinaires would say that the latter system lacks a rational basis in consequence of that fact.

Indeed, the disproportion between New York and Alaska in the 1960 census, which was on the order of 74 to 1 (16,782,304 to 226,167),[16] is infinitely greater than the disproportion between the three Delaware counties in the same enumeration.

New Castle then had 307,446 people, as against 73,195 for Sussex County and 65,651 for Kent County. These proportions are, respectively, 4.2 to 1 and 4.68 to 1—which is far less than the 5.7 to 1 and 5.2 to 1 in Georgia and South Carolina respectively that satisfied the Reconstruction Congress in 1868.

We are therefore constrained, as we examine the basic contentions of opposing counsel in this matter, to repeat the classic sentence with which Mr. Justice Holmes opened his dissent in *Adair* v. *United States*, 208 U.S. 161, 190: "I also think that the statute is constitutional, and, but for the decision of my brethren, I should have felt pretty clear about it."

B. The 1963 amendment to the Delaware Constitution reapportioning the Delaware House of Representatives has a reasonable basis, reflects a good faith effort to comply with Baker v. Carr, provides for periodic reapportionment as the population of the State shifts over the years, and contains an effective enforcement provision

As has been shown, the 1963 Reapportionment Amendment (J.S. App. A77-A81) resulted in the addition of 10 Representatives to New Castle County, two additional being assigned to the City of Wilmington and the remaining eight to rural New Castle County.

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[16] We are aware that there have been changes since 1960, and that California is now the most populous State. See "Nevada Grows Most, Arizona is Next," *The Sunday Star*, Oct. 20, 1963, p. C-2. But these shifts do not vary the argument in the text.

Existing representative districts were retained, the basis for an increase being as follows (Section 2A, J.S. App. A79):

> "Each existing Representative District as set forth in Section 2 of this Article, with a population residing therein in excess of 15,000, as shown by the last official federal decennial census shall be entitled to one additional Representative for each additional 15,000 population or major fraction thereof residing within the District."

The representative districts to be subdivided are to be redistricted by a Redistricting Commission, set up as therein prescribed (J.S. App. A80), with a provision (J.S. App. A81) that "Any qualified voter may apply to the Superior Court to compel the Governor, by mandamus or otherwise, to perform the redistricting and reapportionment duties or to correct any error in redistricting and reapportioning. * * * On appeal, the cause shall be reviewed by the Supreme Court upon the law and the facts."

Once the redistricting is effected, the Governor must proclaim the plan (J.S. App. A80), and this is what he did here to effectuate the 1963 amendment (Del. App. 5a-10a).

Following the 1970 and each successive census (J.S. App. A80), "the new Representative Districts created pursuant to this Section [Section 2A of the 1963 amendment] shall be abolished and the Representative Districts set forth in Section 2 of this Article shall again be re-divided as set forth herein."

Thus the 1963 apportionment is not inflexible. It looks to the future; it provides for reapportionment after each decennial census; and it provides as well a prompt and effective remedy for its enforcement.

The chairman of the Bipartisan Reapportionment Committee that drafted the 1963 amendment testified that the Committee decided on 15,000 or a major fraction thereof

as the limit of each Representative District on the basis of trends in population growth, the small size of the State, the available accommodations for the General Assembly, and in order to give a voice to all segments of society and to all practices and customs (Del. App. 73a-75a). And the Committee decided to leave one Representative to each existing Representative District on the basis that, considering population trends, all Districts would soon grow to reach a major fraction of 15,000 (Del. App. 74a-75a, 91a-92a).

The minutes of the Committee (Def. Ex. 1, Del. App. 100a-339a) reflect a conscientious effort to effect a reapportionment that would comply with the rule of *Baker* v. *Carr*, 369 U.S. 186—at least to the extent that the Committee members were able to ascertain the precise scope of that decision. The minutes also reflect the concern of the Committee over preparing an amendment that would muster the constitutionally required two-thirds majority in both houses (Del. Const. 1897, Art. XVI, Sec. 1; J.S. App. A76), on the view that political action is the art of the possible; and the minutes reflect as well the Committee's concern over the shortness of time available to them in view of the attitude of the district court in the present case (pp. 6-8, 10-11, *supra;* Point IV, *infra*).

Examination of the chairman's testimony (Del. App. 51a-97a) and of the Committee's minutes (Del. App. 100a-339a) will, we think, convey to any dispassionate reader assurance that the 1963 amendment constitutes an effort in the best of faith under very substantial difficulties to reapportion pursuant to the mandate of *Baker* v. *Carr;* that it contains integral provisions for future modifications and for both present and future enforcement; and that it is precisely the kind of legislative effort that has consistently passed muster when attacked in this Court as constituting an impermissible classification.

And yet the district court struck down the 1963 amendment because it considered the disparities thereunder—

which are set out at J.S. App. A31-A33—too great, saying (J.S. App. A41), "we state that we can find no rational basis for the apportionment." Further, the district court held that even a disparity of 2 to 1 between Representative Districts would be too great, and set a limit of 1½ to 1 as the largest permissible variation between such districts. (J.S. App. A51-53).

We submit that this holding—concurred in by all the judges below, see J.S. App. A62, A63—which flatly states that the concept of Equal Protection of the Laws requires a 1½ to 1 ratio and forbids a 2 to 1 ratio for representative districts, constitutes a most remarkable example of reading into a generalized constitutional provision specifics that plainly did not originate in the Constitution but only in the preferences and predilections of the readers.

Surely the proposition that 1/1.50 is constitutional because extending Equal Protection while 1/2 is unconstitutional because imposing Unequal Protection represents constitutional exegesis carried to new and hitherto unsuspected degrees of refinement. Discriminations thus precise may well have amazed the drafters of the Equal Protection Clause. But so far as we are concerned the holding below on this point simply documents the observation of that great constitutional scholar, James Bradley Thayer, when he wrote, some 70 years ago (*Legal Essays*, 159), that

> "Petty judicial interpretations have always been, are now, and always will be, a very serious danger to the country."

We ask this Court to hold that the 1963 Amendment reapportioning the Delaware House of Representatives passes muster under the Equal Protection Clause.

C. Similarly, the 1963 amendment to the Delaware Constitution reapportioning the Delaware Senate complies with the Equal Protection Clause

We have already shown how Delaware, which was formed when the Three Lower Counties made themselves a formal political unit, is in consequence the one State most completely free to construct its legislature on the Federal pattern (Point I, *supra*). We have also shown that the Congress closest in time to the adoption of the Fourteenth Amendment and its Equal Protection Clause enforced that Clause under Section 5 of the Amendment (J.S. App. A71) by readmitting two formerly seceded States that had similarly fashioned their legislatures after the Federal model (Point IIA, *supra*). We have further shown that any holding that a State legislature so fashioned runs afoul of the Equal Protection Clause is untenable, and would be not only incongruous but highly arbitrary (Points IIC, IID, and IIIA, all *supra*).

Accordingly we will not reargue or even restate those propositions here, but will simply discuss the other features of the 1963 amendment reapportioning the Senate that the majority below held unconstitutional.

First. As has been pointed out, the 1963 amendment gave 7 senators to each County, retaining the existing Senatorial districts and adding two senators each to Kent and Sussex Counties each of which had previously had but five. These two additional senators were provided by providing for an election at large in each County, divided for the purpose on an east-west line. See Section 2, 3, and 4 of the 1963 amendment, J.S. App. A78-A79.

These floterial senators roused the presiding judge below to say (J.S. App. A49-A50; footnote omitted):

> "this seems to involve a hidden gerrymander that cannot be countenanced and if the reapportionment created by the 1963 Amendment met the requirements of the Equal Protection Clause in all other respects,

though it does not, this feature alone, in the absence of any substantial possibility of severability, would require us to adjudge the whole Amendment unconstitutional."

In view of the fact that the report of the Bipartisan Reapportionment Committee, on which both political parties were equally represented (Del. App. 52a, 55a-56a) and half of whose members came from New Castle County (Del. App. 85a, 100a), was entirely unanimous (Del. App. 83a, 94a), the addition of two floterial senators in Kent County and in Sussex County was hardly a gerrymander in the classic sense of one political party or one area taking advantage of the other.

But there is no need to pursue this aspect of the alleged gerrymander, because in our view the conclusive constitutional answer to this contention was given by Judge Layton, dissenting on this point below (J.S. App. A66):

> "The majority has also found unconstitutional the 1963 Amendment in so far as it concerns the creation of 2 so-called super senators from each of the two Lower Counties in order to equalize the number of senators from each County at 7. This was a most unfortunate business. Speaking as an individual I would agree with the majority that the result is sheer gerrymandering, but speaking as a judge I am unable to find such an action invalid because, in my view, a Senate composed of an equal number of senators from each county is not an unconstitutionally created body providing the membership of the Lower House is elected on a strict population basis. And simply because the Legislature chose a dubious path by which to arrive at a valid result is not grounds for judicial interference.[5]"

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[5] [Footnote in original] The majority laid emphasis on the fact that voters in the two Lower Counties will now vote for two state senators while in New Castle County they can vote for only one. This reasoning is not without merit but since the end result is the election of seven senators from each County and because, in my view, the value of a vote for a state senator varies throughout the state because of population differences, I am not persuaded that the result offends the Equal Protection Clause."

There is nothing in the design of the floterial senators in Kent and Sussex Counties offensive to the Federal Constitution.

Second. There remain population discrepancies in the several Senatorial districts within each county, as shown at J.S. App. A34.

In view of the limited time available, and the limitation was that imposed by the district court when it allowed the Delaware legislature only from July 27, to August 6, 1962, to consider and act upon the proposal submitted by the Reapportionment Committee (*supra*, pp. 6-7; J.S. App. A1-A6), the reapportionment effected, while not perfect, was undoubtedly the best that could be made.

Within that time limitation, it was hardly feasible to provide for a complete redistricting within each county to equalize the seven senatorial districts. Indeed, it is significant in this connection that, although the district court did present to counsel a reapportionment plan of its own (Ct. Ex. 4, Del. App. 98a-99a), that plan involved only the House of Representatives and not the Senate.

We submit that a plan composed under those limitations cannot be attacked as irrational simply because under less time pressure it would have been possible to formulate a better plan. For, after all, the time factor is a vital element in the equation that circumscribes political action within the art of the possible.

In this connection, too, we desire to emphasize the stress placed by the prevailing opinion below (J.S. App. A35-37) on the circumstance that the people in New Castle County pay very much more in personal income taxes, inheritance taxes, estate taxes, license fees, and tobacco taxes than do those in Kent or Sussex Counties. The opinion (*loc. cit. supra*) states "that in the decade 1952 through 1961 * * * New Castle County collected approximately $10,500,000 in personal income taxes for each representative, while

Kent County collected less than $500,000 for each representative, and Sussex County collected approximately $800,000 per representative."

We had supposed up to now that the traditional philosophy of the Federalist Party, that government should be entrusted only to "the wise, the good, and the rich" (see S. E. Morison, *Harrison Gray Otis* (1913) *passim*), had left the American scene with the demise of that organization. But apparently we reckoned without the views of Sincock *et als.*, who would interpret the Equal Protection Clause to subject, for all time, the few and the poor to the domination of the many and the rich.

The net of the foregoing is that the 1963 amendment to the Delaware constitution complies in all respects with the Equal Protection Clause. From this it follows that the judgment below should be reversed, with directions to dismiss the bill.

IV. THE DISTRICT COURT'S REFUSAL TO GIVE THE DELAWARE GENERAL ASSEMBLY SUFFICIENT TIME TO REAPPORTION THE STATE, AND ITS ISSUANCE OF AN INJUNCTION THAT PREVENTED AMENDMENT OF THE DELAWARE CONSTITUTION ACCORDING TO THE TERMS OF THAT INSTRUMENT, CONSTITUTED FUNDAMENTAL AND VITIATING ERROR.

A. The record shows a continuous course of urgency, haste, and pressure on the part of the district court that is wholly at variance with the standards and approaches prescribed by this Court for litigation involving a State of the Union

On any objective reading, the present record reflects a dominant theme of pressure against a time limit that is wholly at variance with the principles that this Court has formulated to govern litigation involving States of the Union.

First. Each of the opinions of the district court emphasizes, in one form or another, a spirit of haste, of pressure, and of let-us-get-on-with it, which permeated that tribunal's

approach to the grave problem of refashioning a State's Constitution.

In its first opinion (J.S. App. A1-A6), filed on July 25, 1962, the district court stayed the present proceedings only until August 7, 1962, because it was unwilling to let the General Assembly wait. See the excerpt quoted above at pp. 6-7. In this connection, it should be noted that, under Art. XVI, Sec. 1, of the Delaware Constitution (J.S. App. A76), an amendment to the Delaware Constitution must be passed by a two-thirds vote of both houses of successive General Assemblies. The district court was unwilling to let such a reapportionment amendment be effected by the 1963-64 (122nd) and 1965-66 (123rd) General Assemblies. Instead, the court below espoused another alternative, to push the matter through in a great rush. We have already discussed the resultant imperfections of the alternative actually adopted (*supra*, Points IIIB and IIIC), and we advert to them again below, pp. 107-109.

In order to expedite the reapportionment process, the district court suggested that the Delaware General Assembly amend the State Constitution so that apportionment would thereafter be regulated by statute rather than constitutional provision; see the excerpt from J.S. App. A4, quoted above at p. 7.

Thus a Federal Court undertook to recommend a fundamental change in State constitutional policy, for as a matter of political stability apportionment in Delaware had been a subject for constitutional regulation since 1776.

Subsequently, after the constitutional amendment reapportioning the State, House Bill 574 (*supra*, p. 8), had been passed on July 30, 1962 by the 121st General Assembly, the Delaware election officials, defendants below and appellants here, moved for a further stay to enable the 122nd General Assembly, coming into office on January 8, 1963, to be given an opportunity to concur in House

Bill 574, and to make it effective as an amendment to the State Constitution.

The district court denied the stay, expressing in the process its pique over the fact that the General Assembly had not adopted the district court's earlier suggestion that apportionment in Delaware be made a statutory rather than a constitutional matter, and concluding that "This in effect leaves this court in a position where it must proceed promptly to adjudicate the merits of the controversy after full hearing." For the full comment, see the excerpt from J.S. App. A15-A16 quoted above at pp. 10-11.

Throughout the trial, the presiding judge emphasized that "The terrible problem here is one of time" (Tr. 357), repeating twice his expression about "a box of time" (Tr. 607, 608-609).

In the district court's final opinion, the presiding judge again emphasized the time element (J.S. App. A55): "The State of Delaware, the General Assembly, and this court all seem to be trapped in a kind of box of time. The exigencies of the calendar and the oncoming general election of 1964 confront us."

In that opinion, the district court (J.S. App. A56), "Having the box of time in mind," further said "we will allocate to the General Assembly a period of time from the date of our final decree up to and including October 1, 1963, to prepare and enact into law a reapportionment statute acceptable under the law and the guidelines we have endeavored to lay down herein."

We submit that, notwithstanding the presiding judge's subsequent disclaimer (Del. App. 97a), the record amply confirms the view of the Chairman of the Governor's Bipartisan Reapportionment Committee (Del. App. 88a) that:

> "We felt this Court had a gun at the back of the General Assembly of Delaware, and we had better apportion the House of Representatives on a popula-

tion basis under Baker versus Carr, and as fast as we could."

It is thus all too obvious that the "box of time" of which the presiding judge so consistently complained was fashioned by the district court itself.

Second. Moreover, the court below disregarded the principles that should govern litigation involving a State of the Union—and of course the decree and injunction here directly affect the State of Delaware regardless of the docket title of the cause.

In *Virginia* v. *West Virginia*, 220 U.S. 1, 36, at one stage of the long and indeed bitter litigation between those two States, this Court said:

> "A long time has elapsed. * * * But this case is one that calls for forbearance upon both sides. Great States have a temper superior to that of private litigants * * *."

Again, at a later stage, in *Virginia* v. *West Virginia*, 222 U.S. 17, 19-20, this Court said:

> "A question like the present should be disposed of without undue delay. But a State cannot be expected to move with the celerity of a private business man; it is enough if it proceeds, in the language of the English Chancery, with all deliberate speed. Assuming, as we do, that the Attorney General is correct in saying that only the Legislature of the defendant State can act, we are of opinion that the time has not come for granting the present motion. If the authorities of West Virginia see fit to await the regular session of the Legislature, that fact is not sufficient to prove that when the voice of the State is heard it will proclaim unwillingness to make a rational effort for peace."

A particularly significant ruling came in *Virginia* v. *West Virginia*, 241 U.S. 531. There, after the amount due the Commonwealth of Virginia had been determined (*Vir-*

ginia v. *West Virginia*, 238 U.S. 202), that Commonwealth petitioned for a writ of execution against West Virginia, "on the ground that such relief is necessary, as the latter has taken no steps whatever to provide for the payment of the decree" (241 U.S. at 531).

West Virginina resisted on three grounds (241 U.S. at 531-532):

> "(1) 'Because the State of West Virginia, within herself, has no power to pay the judgment in question, except through the legislative department of her government, and she should be given an opportunity to accept and abide by the decision of this court, and, in the due and ordinary course, to make provision for its satisfaction, before any steps looking to her compulsion be taken; and to issue an execution at this time would deprive her of such opportunity, because her legislature has not met since the rendition of said judgment, and will not again meet in regular session until the second Wednesday in January, 1917, and the members of that body have not yet been chosen;' (2) because presumptively the State of West Virginia has no property subject to execution; and (3) because, although the Constitution imposes upon this court the duty, and grants it full power, to consider controversies between States, and therefore authority to render the decree in question, yet with the grant of jurisdiction there was conferred no authority whatever to enforce a money judgment against a State if, in the exercise of jurisdiction, such a judgment was entered."

Here was this Court's ruling (241 U.S. at 532):

> "Without going further, we are of the opinion that the first ground furnishes adequate reason for not granting the motion at this time.
>
> "The prayer for the issue of a writ of execution is therefore denied, without prejudice to the renewal of the same after the next session of the legislature of the State of West Virginia has met and had a reasonable opportunity to provide for the payment of the judgment."

All of the foregoing remarks were made in the controversy involving Virginia's efforts to have West Virginia assume its rightful share of the combined States' pre-separation debt—a suit seeking simply a money judgment. Here, however, there is involved, not what Sincock *et als.* semantically inflate (M/A 20) into "the debasement of the Civil Rights of the plaintiffs"—capitalization in the original—but rather a controversy revolving around the grave problem of a State's very structure of government.

Moreover, this controversy was not one like *Watson* v. *City of Memphis*, 373 U.S. 526, 529, where it could properly be said that "the governing constitutional principles no longer bear the imprint of newly enunciated doctrine." To the contrary, everything in this case was new, for *Baker* v. *Carr*, 369 U.S. 186, plainly had not laid down guidelines for reapportionment, much less determined the overriding issue here, which was and is whether a State legislature may constitutionally be constructed on the Federal pattern. The latter issue, indeed, had been specifically reserved here, almost a month before the final opinion below. *Gray* v. *Sanders*, 372 U.S. 368, 376.

Yet, notwithstanding that the organic structure of a State government was involved, notwithstanding that the governing principles had not been settled or even adumbrated, notwithstanding the admonitions of this Court regarding the spirit in which litigation involving States of the Union is to be conducted and the judicial standards that should govern directions given in such litigation, the district court in this case of literal first impression involving the constitutional shape of Delaware harried and hurried the election officials who as nominal defendants represented the State as though they were so many reluctant respondents against whom a turnover order had been made in a bankruptcy proceeding.

We content ourselves with saying that this is not the way that a court of the United States should deal with the constitution of a constituent State of the Union.

B. The combination of the decree and the injunction below, which effectually prevent any amendment of the Delaware Constitution according to the terms of that instrument, constitutes a gross abuse of judicial power

If, as held by the district court, the apportionment provisions of the Delaware Constitution offend the Equal Protection Clause, then, as can easily be demonstrated, the decree and injunction entered below (J.S. App. A68-A70) effectively preclude amendment of that instrument according to its terms. And while Sincock *et als.* quite agree on this point (M/A 24), we feel it desirable to document the assertion just made.

Article XVI of the Delaware Constitution provides two methods of amendment. Section 1 (J.S. App. A76), the mode employed in 1962-1963, provides for amendment by the General Assembly by a two-thirds vote of both houses, followed first by a general election, and then by a second two-thirds vote of both houses of the newly elected General Assembly. Section 2 (J.S. App. A76-77) provides for a Constitutional Convention, to be composed of one member from each representative district plus two additional members from each county.

The court below has effectively disabled the State of Delaware from amending its Constitution by either of those two methods.

(1) The present General Assembly sits until the general election in November 1964. Until that time it can, by a two-thirds vote, initially pass a new apportionment amendment. This amendment, to become effective, must then be similarly passed by the next succeeding General Assembly which will be elected in November 1964, and which will sit until November 1966. But, if the injunction entered below remains in force, no new General Assembly can be elected, and hence no new amendment to the Delaware Constitution can ever be adopted under the first method.

(2) The decree below (J.S. App. A68) declared unconstitutional the apportionment provisions of the 1897

Constitution, Art. II, Sec. 2 (J.S. App. A71-A75), with its 35 representative districts, five senators each to Sussex, Kent, and rural New Castle, and two senators to Wilmington, on the footing that this arrangement is neither reasonable nor rational (J.S. App. A40-41). The constitutional convention provision of the same instrument, Art. XVI, Sec. 2 (J.S. App. A76-A77), provides for a convention of 41 members, 35 from the several representative districts, plus two from each of the three counties, and this was specifically continued by the 1963 amendment (J.S. App. A81).

Plainly, if the legislative apportionment provision of the Delaware Constitution is unreasonable or irrational because of the current distribution of Delaware's population, then so is the constitutional convention apportionment provision; if, because of malapportionment, a new General Assembly can not be validly constituted, then a Constitutional Convention for the same reason can not be validly constituted. Indeed, this follows as an *a fortiori* proposition, because Section 2B of the 1963 amendment (J.S. App. A81) specifically provided that no delegates could be elected to a Constitutional Convention from any of the new Representative Districts added by Section 2A thereof. This was the view of Sincock *et als.* below (J.S. App. A3); it is their view now (M/A 24); and it appears to have been adopted by the district court following a full trial (J.S. App. A56).

How, then, can the paralyzing injunction be justified?

Sincock *et als.* (M/A 24-25) characterize its issuance as an exercise of the district court's sound discretion, on the footing that the General Assembly was still free to reapportion by statute—notwithstanding that apportionment in Delaware has been a constitutional matter since 1776—and urge that the election officials' complaint "is that the action of the District Court will not permit the Legislature to delay the enjoyment of the exercise of their full franchise to these appellees until the 1966 election."

This last statement however, strongly begs the question at issue, which is, at the very least, far from clear. It has yet to be demonstrated that to compose a State legislature on the Federal model derogates from the enjoyment of the exercise of anyone's full franchise. Even in private causes, the traditional equity standard in respect of injunctions is the time-honored formula that "To doubt is to deny." Much more, then, should a Federal court of equity stay its hand when the validity of the organic structure of a State of the Union is at issue.

Perhaps the real clue to the injunction below, which, as we have pointed out (*supra*, p. 18), was entered on the district court's own motion and without any hearing, is another instance of the same pique that was expressed at an earlier stage of the present litigation (J.S. App. A15-A16, quoted above at pp. 10-11).

For, as Sincock *et als.* duly emphasized (M/A 10-11, 24-25), the district court's final opinion of April 17, 1963 (J.S. App. A16-A67) and its final decree of April 30 (J.S. App. A68) were followed by an opinion of the Supreme Court of Delaware to the Governor on May 6 (Del. App. 1a-5a), holding that the 1963 amendment was effective nevertheless, and by the Governor's Proclamation on May 17 (Del. App. 5a-10a), announcing a reapportionment pursuant thereto.

The Delaware Supreme Court's opinion counseled deference to the district court's opinion and decree, pointing out however the obvious fact that that decree was subject to appeal (Del. App. 4a-5a). The Governor's Proclamation duly recited the fact of the decree and the circumstance that the time to appeal therefrom had not expired. (Del. App. 5a-6a). Thereupon, just three days later, without notice and without a hearing, the district court issued its injunction (J.S. App. A69-A70)—and refused to stay that injunction when requested to do so after the first notice of appeal, from the final decree, had been filed.

Thus the entire constitutional apparatus of a State of the Union and its entire electoral machinery were paralyzed

by Federal judicial decree because the defendant election officials, appellants here, refused to accept as conclusive pending appeal the district court's Design for Delaware.

It took an application to the Circuit Justice for a stay pending appeal, which was promptly forthcoming, to restore a sense of balance and to effect a return to traditional and normal judicial standards.

We said in bringing the present appeal here (J.S. 21):

> "The net of the foregoing is that a court of the United States, after declaring unconstitutional under the Constitution of the United States the apportionment provisions of a State Constitution, has effectually disabled the State from ever amending that instrument according to its terms. This, we submit, is more than abuse of discretion. This is an abuse, a gross abuse, of judicial power."

Today, some three months later, after this Court has not only agreed to hear this case but has granted our motion to advance, we feel no need to vary a single word of the foregoing.

C. The record further shows a consistent compulsion on the part of the district court to effect a reapportionment of the Delaware General Assembly by Federal judicial decree

First. As we have shown (*supra*, Points IIIB and IIIC), the 1963 amendment to the Delaware constitution was hastily drawn, because the district court refused the General Assembly more time for deliberation. Had such time been allowed, then it would have been entirely feasible, using the basic Federal pattern for the composition of the Delaware General Assembly, to provide for the equalization of Representative and Senatorial Districts within each of the State's three counties.

Such a plan, we should say for the information of this Court, was duly prepared and presented in the second report of the Governor's Bipartisan Reapportionment Committee in June 1963, submitted after the decree below, and bills for that purpose were introduced in both houses

of the General Assembly in June 1963. One of these bills, Senate Bill 195, providing for the equalization of Senatorial Districts within each county, was duly passed by the Senate on June 27, 1963; the House took no action, either on Senate Bill 195 or on a companion measure (House Bill 373) that was designed similarly to equalize all Representative Districts within the State.

This Court has said (*Girouard* v. *United States*, 328 U.S. 61, 69), "It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law." It is similarly risky to attach controlling significance to a State legislature's inaction.

Perhaps the General Assembly was averse to any reapportionment by statute in the face of the consistent Delaware tradition that this was a matter too basic to be entrusted to the vagaries of successive legislatures, that a subject so fundamental must be regulated by the State's fundamental law.

Perhaps the General Assembly was also of opinion that to effect a reapportionment pending appeal would render the present appeal moot. Or perhaps the General Assembly believed that it would stultify itself by complying with the district court's decree after it had directed an appeal from that very decree in an act whose preamble recited that "the Constitution of the State of Delaware is unique and there are cultural and historical factors peculiar to the State of Delaware, distinguishing the Delaware case from all others in the nation," and reciting further that "it is in the best interest of the General Assembly and of the State of Delaware, and its people that the provisions of the Constitution of the State of Delaware be upheld and amended only by the elected Representatives of the people." Chapter 90, Vol. 54, *Laws of Delaware*.

It is not profitable to speculate further. Rather, it is sufficient here simply to note, first, that a more perfect apportionment could easily have been formulated if the district court had allowed Delaware time to do so; and, second, that the circumstance that no further action re-

specting reapportionment has been taken during the pendency of the present appeal by no means establishes that the Delaware General Assembly is either unwilling or unable to effect a reapportionment consistent with the Constitution of the United States once this Court has established the governing guidelines. But, as will appear, the district court is shown on this record to have been far more interested in proceeding by judicial decree.

Second. This Court in *Virginia* v. *West Virginia*, 246 U.S. 565, announced its power and determination to enforce a money judgment against a State of the Union. But, very plainly, such a step comes at the end of the judicial process, not to be lightly undertaken or even entertained, and in that instance happily proved unnecessary.[17] Indeed, to rewrite a State's constitution and to reapportion a State legislature, all by a decree issuing out of a United States District Court, seems to us much like the final step of outlawry that was the ultimate sanction of the common law (3 Bl. Comm. *283-284, 4 *id.* *318-320).

Here, however, in a vastly more complex situation, where State reapportionment by Federal court decree necessarily involves a rewriting of a State constitution, and hence should have been the very last resort, the court below seems to have been irresistibly drawn to that course as the preferred first order of business, and this before any authoritative guidelines had been announced here.

Thus, at the very outset of the litigation, the district court undertook to advise the General Assembly how it should amend the State Constitution (J.S. App. A4;

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[17] See W. Va. Acts 1919 (Ex. Sess.), c. 10, providing for payment of judgment partly in cash and partly by bonds that Virginia had agreed to accept at par. For discussions of the enforcement problem, see Coleman, *The State as Defendant under the Federal Constitution*, 31 Harv. L. Rev. 210; Powell, *Coercing a State to Pay a Judgment*, 17 Mich. L. Rev. 1; Fischer, *Enforcement of a Money Judgment against a State*, 12 St. Louis L. Rev. 57; Good, *Judicial Determination of Interstate Disputes*, 26 Neb. L. Rev. 1; cf. Note, *The Virginia-West Virginia Debt Controversy*, 31 Harv. L. Rev. 1158.

supra, pp. 7, 99), and then publicly regretted that its gratuitous advice had not been followed (J.S. App. A15-A16; *supra*, pp. 10-11, 100); next, the district court presented at the pretrial conference a reapportionment plan of its own so far as the lower house was concerned (Ct. Ex. 4, Del. App. 98a-99a), and invited the parties to comment on it (*supra*, pp. 12-13); at the trial on the merits, the district court invited Sincock *et als.* to submit a plan of reapportionment, heard extensive testimony thereon (*supra*, p. 13), and commented on that plan—and on the numerous errors therein—at some length in its final opinion (J.S. App. A57-A62); additionally, the district court set a deadline for the General Assembly to pass a reapportionment statute (J.S. App. A56-A57), on the footing that there was no longer any valid provision in the Delaware Constitution regulating apportionment; and, finally, by preventing any amendment of the Delaware Constitution in the manner prescribed by that instrument, the court below virtually assured to itself the task of reapportioning the Delaware General Assembly by Federal judicial decree, a task which, indeed, Sincock *et als.* urged it to assume, and for which the presiding judge declared himself quite ready (Tr. 737; J.S. App. A56-A57).

Except only for the currently adduced proposal for a "Court of the Union" to be composed of the fifty Chief Justices of State courts of last resort, which shall review the judgments of this Court, we know of nothing equally destructive of the State-Federal relationship that is, literally, indispensable to the very existence of the Republic, as the course so relentlessly pursued—and pressed—by the district court in this case.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, with directions to dismiss the complaint.

If, however, the Court should be of opinion that, while Delaware is entirely free to model its legislature on the Federal pattern, with each of its Counties entitled to equal representation in the senate thereof, there is still need to

ameliorate the population discrepancies now present under th 1963 reapportionment amendment, then the judgment below should be reversed, with directions that the district court stay all further proceedings herein until the present (1963-1964) and the next following (1965-1966) General Assemblies shall have had an opportunity to amend the Constitution of Delaware in the manner prescribed by that instrument, in order to conform it to the judgment of this Court.

Respectfully submitted.

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NOVEMBER 1963.

APPENDIX

EXCERPTS FROM THE DEBATES IN THE 40th AND 41st CONGRESSES ON THE READMISSION OF THE FORMER CONFEDERATE STATES.*

The bill that became the Act of June 25, 1868, *supra*, p. 57, pursuant to which six former Confederate States were readmitted, was H.R. 1058, 40th Cong., 2d sess. (Cong. Globe, 40th Cong., 2d sess., p. 2412).

Mr. Bingham (p. 2413) promptly offered an amendment to strike the words,

> "That the constitutions of said States shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote who are now entitled to vote by said constitutions respectively, except as punishment for such crimes as are now felonies at common law whereof they shall have been duly convicted."

and to insert in lieu thereof,

> "that civil and political rights and privileges shall be forever secured in said States to all citizens of the United States resident therein, as is now provided in said constitutions respectively."

Mr. Thaddeus Stevens of Pennsylvania offered an amendment to be added to the Georgia constitution, as follows (p. 2445):

> "And be it further enacted that the provisions of section seventeen article five of the Constitution of Georgia shall not apply to a debt due any person who, during the whole time of the rebellion was loyal to the United States and opposed to secession."

Mr. Pruyn thereupon raised a point of order, requesting a ruling that the House had no right to legislate so as to interfere with the provisions of constitutions of any

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* We acknowledge our obligation to John F. Doyle, Esq., of the District of Columbia Bar for assistance in sifting and analyzing the voluminous debates dealing with this subject.

State. The Speaker overruled the point of order, on the ground that he had no authority to rule on the constitutionality of a bill.

Mr. Stevens supported the authority of Congress to make such amendments, saying (p. 2445):

> "I find it in the Constitution which says that Congress may admit new States. I hold that under that provision Congress may admit them in such shape as it pleases. That power being fully granted we have a right to exercise it. I do not find any difficulty about it."

To this Mr. Beck of Kentucky countered (p. 2446):

> "* * * I say in all candor that his proposition to amend the constitution of the State of Georgia because it does not suit this House is presenting the issue fairly and clearly. This House made that constitution; it ordered how it should be made, selected or rather appointed the men to frame it, and all the others excluded from or admitted to the polls whom they pleased and under the pretense of an election not only told the people of these States what their constitutions should be and remain but that none but the adherents of the dominant party should have any part or lot in the administration of the governments under them, no matter how odious they might be to the people there.
>
> "These constitutions do not represent the action of the people of any of those States but they represent in fact the will and the orders of Congress."

And Mr. Beck continued with a general attack on the reconstruction program (pp. 2447-2450).

Mr. Garfield of Ohio declared a nullity the act of the Ohio legislature purporting to withdraw that State's ratification of the Fourteenth Amendment (p. 2451), and then supported the pending bill (p. 2452). Further general debate on the bill ensued (pp. 2453-2456).

On the next day, May 14, 1868, Mr. Bingham spoke on his amendment (p. 2462), after which another amendment,

to exclude the State of Alabama from the pending bill, was voted down (p. 2463).

Thereupon Mr. Stevens argued further, first in support of the bill and then in opposition to the pending Bingham amendment (pp. 2464-2465):

"* * * Now, sir, what is the particular question we are considering. Five or six States have had submitted to them the question of forming constitutions for their own government. They have voluntarily formed such constitutions under the direction of the Government of the United States. * * * They have sent us their constitutions. Those constitutions have been printed and laid before us. We have looked at them. We have pronounced them republican in form; and all we propose to require is that they shall remain so forever. Subject to this requirement, we are willing to admit them into the Union. * * *

"* * * The Gentleman from Ohio (Mr. Bingham) has moved an amendment against which I most earnestly protest. He proposes against the recommendation of the committee to leave each of these states free after its admission to amend the provisions with reference to the elective franchise as it may deem proper with regard to its own citizens. All of those States have now adopted the principle of Universal Suffrage. The country has adopted that principle so far as it has spoken of late. What we desire is to secure in these States the maintenance of this principle which they have adopted so that every person of requisite age within those States shall be entitled to vote."*

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* In view of the Court's comment in *United States* v. *Florida*, 363 U.S. 121, note 13 at 127, that "The congressional history indicates that all the constitutions were given equally close attention," it seems appropriate to quote what Mr. Stevens said about the Arkansas constitution in discussing the bill that became the Act of June 22, 1868, *supra*, p. 57, which dealt only with Arkansas (p. 2399):

"Now, all I have to say is this: this constitution of Arkansas has been before us for four weeks, fairly printed. * * * I think that this constitution is above all suspicion, and I am a little

Mr. Stevens' amendment (p. 2445; quoted *supra*, at p. 112) was adopted, as was the Bingham amendment, the latter in the following form:

> "That the constitutions of the said States shall never be amended or changed so as to discriminate in favor of or against any citizen or class of citizens in the right to vote who are now entitled to vote by said constitutions respectively, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted; and no person shall ever be held to service or labor as a punishment for crime in said States except by public officers charged with the custody of convicts by the laws thereof."

Thereupon the bill passed the House by a vote of 109 to 35, with 45 members not voting.

On May 16, 1868, the bill reached the Senate, where it was referred to the Committee on the Judiciary (p. 2488).

On June 5, Mr. Trumble reported (p. 2858) that the Committee had struck out Alabama and divided on whether or not to insert Florida. The Committee also struck out a further provision of the Georgia constitution, and inserted a provision requiring that the Georgia legislature declare the assent of that State to those excisions; this was said to be in accordance with a similar requirement imposed on Missouri in 1821.

Extensive debate followed (pp. 2859-2871, 2895-2900, 2902-2904). Specific debate then centered on whether or not

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scrupulous and particular about any constitution I am called to vote for. Now, with a constitution with which I can find no fault, after it has been so long before us, I cannot for a moment conceive that there has not been time enough allowed for all of us to become acquainted with it. And as in equity that is presumed to be done which should be done, which ought to be done, therefore it is to be presumed that there is not a man in this House who does not know all about this constitution."

Alabama should be in the bill (pp. 2927-2934, 2964-2967), with the result that Alabama was put back into the bill by a vote of 22 to 21.

Senator Sherman (p. 2968) moved to strike out the clause imposing on Georgia the "fundamental condition" that she eliminate portions of her constitution. (The language he proposed to strike is that which became the proviso to Sec. 1 of the Act of June 25, 1868, as finally passed; it is quoted at p. 64, *supra*). Senator Sherman said in support of his amendment (p. 2969):

> "When we go beyond securing the enforcement of the guaranty of republican government, which we have the power to do, when we undertake to legislate for them upon matters on which we have passed, we transcend our powers."

On June 9, 1868, Senator Trumble recurred to the question of Georgia's constitution, saying (p. 2969):

> "Mr. President, the authority by which Congress declares these cases null and void in this particular case is to be found in a provision in the constitution of Georgia itself. The people of the State of Georgia when they adopted their constitution in convention and ratified it at the polls provided that Congress might accept the constitution with conditions. That provision will be found in sec. II of Article II:
>
> "'Should this constitution be ratified by the people and Congress accept the same with any qualifications or conditions the government herein provided for, and the officers elected shall nevertheless exist and continue in the exercise of their several functions as the government of this State so far as the same may be consistent with the action of the United States in the premises.'"

On the following day, Senator Williams said (pp. 2998, 3000):

> "• • • If I understand the reconstruction laws it is not necessarily the duty of Congress to revise the

Constitution of every one of these States, and if in the judgment of Congress some clause may be there found which may be regarded as in contravention of the Constitution of the United States, to strike out that clause and revise and amend the constitution and make it in entire conformity to our views of law or expediency, because if we assume to pursue that course we might just as well have made these constitutions at the beginning and sent them down there with instructions to the people to adopt them as the constitutions of the several States. It seems to me, as this is a doubtful question, that the people of the State of Georgia should be left to decide it for themselves as to whether or not this section of their constitution does accord with the Constitution of the United States. To undertake to revise it by these so-called fundamental conditions is undertaking, it seems to me on our part to make a constitution for the people of Georgia; and certainly it cannot be said that their constitution with this clause in it is not republican in form, as it is required to be by the reconstruction laws of the Congress.

* * * * * * * * *

"* * * Now, Sir, ought we not let the people of the State of Georgia manage this matter for themselves? We are in no way implicated if we accept this constitution. We did not make it. We do not pass any judgment upon this provision of the constitution. I doubt not there are many provisions in all these constitutions about the constitutionality of which men might very properly differ, but if any man is aggrieved by any provision of any constitution there that is supposed to be unconstitutional, the courts of the country are open to redress, and that man can vindicate his rights there. But, Sir, I deny that it is our business to undertake to supervise the creation of these constitutions beyond requiring that they shall be republican, that they shall protect the civil and political rights of all men; but so far as contracts are concerned or commerce or business within the jurisdiction of the several States, I submit that the people there ought to be left to regulate those matters for themselves."

Senator Conkling said (p. 3001):

> "* * * The constitution proposed by the State of Georgia provides for its own acceptance by Congress, with such qualifications or conditions as may be thought necessary by the Congress of the United States; but I did not suppose that it was necessary to appeal to this provision of the constitution of Georgia in order to vindicate the recommendation of the Committee. On the contrary, it seemed to me that this proposition fell precisely within the principle of the Missouri case. That constitution as was alleged, in defiance of the Constitution of the United States attempted to set up an inequality in its own favor; and it was to level that distinction and to conform it to the Constitution of the United States that Congress imposed what was there called a condition. * * *"

Following further debate (pp. 3002-3007), Senator Sherman's amendment was defeated, 35-8 (p. 3008), and Senator Williams offered a further amendment, reading:

> "and thereupon the officers of each State duly elected and qualified under the constitution thereof shall be inaugurated without delay; but no person prohibited from holding office under the United States or under any State by section three of the proposed amendment to the Constitution of the United States known as Article Fourteen shall be deemed eligible to any office in either of the said States."

In support of his amendment, Senator Williams said (p. 3008):

> "* * * As to the other provisions the adoption of the constitutional amendment by the Legislature of a State does not necessarily put the constitutional amendment in force and by virtue of that constitutional amendment certain persons are made ineligible to any office under the Government of the United States or under any State government. * * * There is a question in the country as to whether or not that amendment is now a part of the Constitution of the United States; but in any event, no matter what may be

> the view taken of that question when these States ratify the constitutional amendment and when it becomes a part of the Constitution which it is supposed will be the necessary effect of their action, let their offices be subject to that amendment. If persons who will be ineligible under the constitutional amendment when it takes effect are now permitted to go into office, the offices will be vacated by the adoption of that constitutional amendment. Why not provide at once that no such men shall be inaugurated. * * *"

After discussion (pp. 3009-3012), the Williams amendment was adopted by a vote of 28 to 15 (p. 3013).

Thereupon there was further discussion concerning the inclusion of Alabama (pp. 3014-3016), but a further amendment to strike Alabama from the pending bill was lost, 16 to 24 (p. 3017).

Next followed (pp. 3018-3021) discussion of a provision in Alabama's constitution that read:

> "That all navigable waters shall remain forever public highways, free to the citizens of the State and the United States, without tax, impost, or toll imposed, and no tax, toll, impost or wharfage shall be demanded or received from the owner of any merchandise or commodity for the use of the shores or any wharf erected on the shores or in or over the waters of any navigable stream, unless the same be expressly authorized by the General Assembly."

Mr. Conkling moved to excise this provision because "it deprives riparian owners of the rents, issues and profits of their land," but his proposal was voted down, 16 to 23 (p. 3022).

Thereupon, Senator Summer made a long speech (pp. 3024-3027), in the course of which he said:

> "* * * The song of States' Rights has for its constant refrain the asserted *Equality of the States.*
>
> * * * * * * * * *

"If we look further and see how the senatorial equality of States obtained recognition in the Constitution we shall find new occasion to admire that facility which has accorded to this concession so powerful an influence, and here the record is explicit. The National Convention had hardly assembled when the small States came forward with their pretensions. Not content with suffrage in the Senate, they insisted upon equal suffrage in the House of Representatives. They had in their favor the rule of the Continental Congress and also of the Confederation, under which each State had one vote. Assuming to be independent sovereignties they also had in their favor the rule of International Law. Against these pretentions the large States pleaded the simple rule of justice and here the best minds concurred. At an early day we find Mr. Madison moving that 'the equality of suffrage established by the confederation ought not to prevail in the National Legislature.' This proposition so consistent with reason was seconded by Gouverneur Morris and according to the report 'being generally relished,' was about being adopted when Delaware, by one of her voices on the floor, protested, saying that, in case it were adopted, 'it might become the duty of her delegates to retire from the convention.' Such was the earliest cry of secession. Gouverneur Morris, while observing that the valuable assistance of these delegates could not be lost without real concern, gave his testimony that the change proposed was so fundamental an article in a National Government that it could not be dispensed with (Elliot: Debates, Vol. 5, p. 135). Mr. Madison followed by saying very justly that 'whatever reason might have existed for the equality of suffrage when the Union was Federal among sovereign States it must close when a National government should be put in its place.' Franklin in a similar spirit reminded the convention that the equal suffrage of the States 'was submitted to originally under a conviction of its impropriety, inequality and injustice (ibid., p. 181). This is strong language from the wise old man but very true. Elbridge Gerry after depicting the States as intoxicated with the idea of their sovereignty said that 'the injustice of allowing each an equal vote was long insisted on; that he voted for it; but that it was against

his judgment and under the pressure of public danger and the obstinacy of the lesser States (ibid., 259). Against these overwhelming words of Madison, Morris, Franklin and Gerry, the delegates from Delaware pleaded nothing more than without an equal suffrage, 'Delaware would have about one-ninetieth for its share in the general councils while Pennsylvania and Virginia would possess one-third of the whole'; and New Jersey by her delegates pleaded also that 'it would not be safe for Delaware to allow Virginia sixteen times as many votes as herself.' (Ibid., p. 211) On the part of the small states the effort was for power disproportionate to size. On the part of the large states there was a protest against the injustice and inequality of these pretensions especially in a Government national in character. The question was settled by the great compromise of the Constitution according to which representation in the House of Representatives was proportioned to population while each state was entitled to equal suffrage in the Senate. To this extent, the small states prevailed and the Senate ever since has testified to the equality of states or rather according to the language of the Federalist on this very point, it has been the 'palladium to the residuary sovereignty of the States.' (Federalist No. 43)

* * * * * * * * * *

"* * * I conclude as I began, in favor of requiring conditions from States on their admission into the Union and I insist that it is our especial duty, in every possible way, by compact and by enactment to assure among these conditions the equal rights of all and the participation of every citizen in the government over him without which the State cannot be republican. * * *"

On June 10, 1868, the bill passed the Senate, 31 to 5, with 18 not voting (p. 3029). When it was reported back to the House (p. 3090), there was discussion primarily about Florida (pp. 3091-3096). In the course of that discussion, Mr. Paine, a member of the Committee on Reconstruction, said (p. 3091):

"* * * it has been my duty as a member of the committee to scrutinize this constitution. I ought to explain to the House its character. After I have done that it will be for each member to decide himself whether he will or will not vote for concurrence."

And another member said (p. 3094):

"With a microscopic view the Committee on Reconstruction, or a majority of them, have looked into the details of the constitution of Georgia, and propose to strike out of it certain provisions."

In the end, the House concurred in the Senate amendments, 111 to 28, with 50 not voting (p. 3097).

The President vetoed the bill (p. 3484), but it was passed over his veto (pp. 3485, 3488), and became the Act of June 25, 1868, c. 70, 15 Stat. 73, discussed *supra*, pp. 57 *et seq.*

We turn now to the 1st Session of the 41st Congress, to the debates on the measure that eventually became the Act of December 22, 1869, *supra*, pp. 64, 65-66.

On April 7, 1869, (Cong. Globe, 41st Cong., 1st sess., p. 591), Mr. Butler of Massachusetts, from the Committee on Reconstruction, reported H.R. 259 "to enforce the fourteenth amendment to the constitution and laws of the United States and to restore the State of Georgia to the republican government elected under its new constitution."

Mr. Butler said (p. 591):

"The first section of the bill provides that the Governor of the State of Georgia shall be authorized and directed forthwith by proclamation to summon all persons appearing to have been elected to the senate and house of representatives of said State by the proclamation of Major General George G. Meade, commanding the military district including the State of Georgia, dated June 25, 1868, to appear at a day certain, to be named in said proclamation, at Atlanta, in

said State, within six months from the passage of this act; whereupon the members of said senate and house of representatives, qualified as hereinafter provided, shall assemble on the day named, and organize their respective houses under the constitution of the State of Georgia and the laws of the United States, and then shall be invested with authority to make such enactments and have such legislative proceedings as are authorized by the laws of the United States and the constitution of the State of Georgia.

"The second section provides that when the persons so elected to said senate and house of representatives shall be convened as aforesaid each and every person claiming to be elected as a member thereof shall take and subscribe the oaths of office prescribed by law for officers of the United States and by the constitution and laws of the State of Georgia, before the district judge of the United States for the district of Georgia, who is hereby authorized to administer the same, and file the same in the office of the secretary of the State of Georgia, unless the disability of such person so to do shall have been removed by act of Congress, which oaths or affirmations shall be recorded by the secretary of the State of Georgia; and the originals or a copy of the record thereof, duly certified by the said secretary of State, shall be competent evidence; and every person claiming to be so elected, who shall refuse or decline or neglect or be unable to qualify himself as above provided, shall not be admitted to a seat in the senate or house of representatives of said State, or to participation in the proceedings of either of them, but shall be regarded as ineligible. * * *

"The third section provides that the attempted expulsion of the members of the senate and the house of representatives of the State of Georgia heretofore had on the ground that they were of African descent is hereby declared void."

To this Mr. Beck argued (pp. 592, 594):

"* * * Before the House can consider understanding the propositions contained in this Bill it is indispensable that the present status of Georgia should be

fully understood and carefully considered because I assume that there is no man so radical—I might say so utterly regardless of decency—as to vote to set aside and annul her State government if she has fully complied with your own reconstruction acts especially if Congress has so decided. I propose to show briefly that she has; that Congress and especially this House has so declared and that you might with as much propriety pass this bill in relation to New York or Massachusetts as in relation to Georgia.

* * * * * * * * * * *

"But beyond all that, and admitting what I deny, that you have the right to inquire into the decision of the Georgia Legislature as to the eligibility of its members, I assert—and I challenge contradiction here and now from any member of the Reconstruction Committee of this or the Fortieth Congress, or from any member of this House—that there is not one scintilla of evidence before the House taken either by it, or its committee, or in any other form to make it legal testimony before any tribunal, that a single member of either house of the Georgia Legislature was ineligible under the fourteenth amendment. I ask now who among the two hundred and seventeen members is ineligible? Name the man, the office he held before the war, the acts he committed during the war, and the testimony taken either by this House or any committee of it or by its authority, to sustain any charge against any member."

Mr. Voorhees then attacked the bill (p. 601):

"* * * But let us look a little more closely at the details of this second attempt upon the life of the State of Georgia. What are the pretexts assumed for the second destruction of this unhappy State? They are set forth in the preamble. It is there stated that the Legislature elected under the new constitution refused to purge itself of members who were disqualified by the fourteenth amendment to the Constitution of the United States. The report of General Meade, pages 8 and 9, shows this statement to be untrue. It will be seen there that as commander of the department of

the South he required steps to be taken to test the eligibility of members under the fourteenth amendment as soon as the Legislature convened. * * *"

No vote was taken on H.R. 259 in this session.

In the 2nd Session of the 41st Congress, there was introduced in the Senate S. 281, which approximated the Butler bill of the previous session (Cong. Globe, 41st Cong., 2d sess., pp. 3, 86).

Senator Morton (p. 165) moved an amendment providing that the Georgia legislature should be provisional only until it has ratified both the Fourteenth and the Fifteenth Amendments and the Senators and Congressmen from Georgia had taken their seats.

Senator Drake (p. 165) opposed, for the reason that the future validity of the amendments might be drawn in question on the ground that Georgia had ratified them under duress. Senator Thurman (pp. 166-170) asserted that the coercion of Georgia would establish a dangerous principle.

Senator Sawyer said (p. 171):

"The dominant party, who, having no other power under the Constitution than to propose an amendment to the Constitution for the acceptance or rejection of the States, have withheld them by force and thrust amendments down their throats, will hereafter find in this country, not perhaps from the states which have been the victims of that illegality directly, but from other States, the question raised as to whether an amendment so obtained has any legal, binding force upon a free and a brave people.

"The wrong is just as great to the State of Ohio, to the State of New York, and to the little State which I have the honor in part to represent upon this floor [South Carolina] as it is to those who are made the unhappy instruments for depriving themselves and others of their rightful opportunity to reject or assent, which was intended to be given to them by the Con-

stitution of our Government. A forced adoption would be no adoption. It must be free. The heart and the will must go with the act or it is void, it is duress. You say that they are free. Free to do what? Free to live under the rule of the bayonet; free to live without one thing for which this Government was created—not citizens, but subjects? Why, sir, it seems to me that towards this State the Congress is occupying the attitude of the cat towards the mouse, that plays with it before it finally puts an end to its pain. * * *"

Senator Williams, however, supported the Morton amendment (pp. 172-173), saying:

"Now, sir, a word as to the coercion imposed upon the State of Georgia by this proposed amendment. It may be called coercion or not, as you please. Georgia saw proper for reasons best known to herself to engage in a conspiracy for the dissolution of the Union; she withdrew her representation from Congress and undertook to destroy the Government of the United States; and Congress undertakes to say that before she shall resume her representation in these Halls she shall comply with certain terms and conditions which, in the judgment of Congress, are necessary for the peace and welfare of the country. That Congress has the power to impose these terms and conditions upon the rebel States is a question that I regard settled forever in this country. It is now too late to discuss or controvert the right of Congress upon that subject. Sir, it has been determined, not only by repeated decisions of the legislative department of the Government, but it has been submitted to, reviewed by, and affirmed by the American people time and again, and the doctrine has been recognized, too, by the Supreme Court of the United States in affirming that it belongs to the political department of the Government to say when a State government does or not exist within a State. * * *"

Senator Saulsbury then attacked the bill (pp. 201-204):

"* * * President Grant himself acknowledged that Georgia had done everything required of her by your

reconstruction acts of Congress. Then she was entitled to admission, if she has to come and knock at your door for admission. You are not legitimate doorkeepers in this controversy. You have no such exalted legal position as doorkeeper of the Senate of the United States. The Constitution of the United States alone guards that door, and you are usurpers if such is your greed and thirst for office as a political party that you want to become and do become doorkeepers to the Senate Chamber and House of Representatives, to keep out or to let in whom you please. Here is your President saying that Georgia has done everything required of her. Oh, but then, he says, after she did all this there were several poor negroes turned out of the Legislature; and now you who love and cherish the African race so well, you the great political humanitarians of the age, you who may find that the vote of the African race is necessary for your continuance in power, are appealed to by your chosen leader to legislate further in reference to Georgia; and lo and behold, you implicitly obey his commands, and here is a bill before us to do the bidding of the Executive! * * *"

Further debate, frequently bitter, followed (pp. 205-222). Then Senator Casserly said (pp. 223-224):

"What has Congress to do with the ratification by the States? The function of Congress is ended when it proposes. It has nothing else to do with the subject, just as the function of the President is ended, in appointing to office, when he proposes a name to you. Suppose he should surround this Chamber with an armed force and forbid you to go out for meat, drink, candlelight, or fife until you had agreed to his nominee, would that be a valid confirmation? Would that be an act of ratification which would bind anyone? Would it bind this body any longer than until the external force was removed? That is entirely too plain for argument. Therefore I say that the coercion which by the declarations of Senators is to be exerted upon Georgia whether it be expressed in the bill or omitted from it, is coercion that invalidates all ratifications which have in any substantial or material degree been affected by that coercion. * * *"

Senator Morton's amendment had originally (p. 165) provided for Sec. 8 of the pending bill to read:

> "That the legislature shall be provisional only and until after it has ratified the fourteenth and fifteenth amendments to the Constitution of the United States, and Senators and Representatives in Congress from the State of Georgia have been admitted to their seats."

Following the debate, it was modified to read,

> "That the legislature shall ratify the fifteenth amendment to the Constitution of the United States before Senators and Representatives from Georgia are admitted to seats in Congress."

Thus modified, it was adopted, 38 to 15 (p. 224), and, shortly thereafter, the entire bill passed the Senate by a vote of 45 to 9 (p. 232).

In the House, following preliminary discussion (pp. 245-247), Mr. Woodward said in the course of a long speech (pp. 255-262):

> "* * * The then member from Massachusetts, Mr. Boutwell, who brought it in and who is now at the head of the Treasury Department, declared on introducing it that it was the final consummation of a series of measures that the Republican party had contemplated. That was the 'consummation.' And the 'consummation' was in that second section, taking away from the States of this Union the power now secured to them by the Constitution of the United States to regulate suffrage, and vesting it here in the Federal Government, consolidating the entire political power in this country in the hands of this Federal Government. That is the meaning of the fifteenth amendment, and that is the reason why Massachusetts is in such hot haste to get it ratified.
>
> "Massachusetts sees very clearly how it is going to inure to her benefit to have this Congress regulate

every election district in the country. And I expect after the fifteenth amendment is adopted the honorable gentleman from Massachusetts [Mr. Butler] will bring in an election law to relieve all the states from any further attention to elections from that time forth.

* * * * * * * * *

"What this Constitution intended to secure to the people of Georgia is a republican form of government when the State of Georgia, which is the other corporation over them, has failed to furnish them with a republican form of government. But the State of Georgia has adopted the very form of government which was prescribed to them in these reconstruction acts. The President recites it; General Meade recites it; the whole history of the country shows it. * * *"

Mr. Eldridge said (p. 281):

"* * * Doubtless so long as bad government continues in Georgia under Federal intervention, social unrest, and military representation there will be crime. So there has been violence and crime in other States, and will be to the end of time; but who is to judge of its penalties? What has the Federal Congress to do with it? Where is the power under our system to deal with such violence by Federal action? Where in this is the reason of a sweeping law destroying the institutions of a whole people for the delinquency or crime of a few? We overturn not alone the Legislature, but invalidate its acts, destroy its courts, affect its judicial judgments, divorce marriages, bastardize children, uproot and overturn all the social with the political order; and all for what? A bad white senator or Radical politics is killed by a negro! This is reconstruction and the bill 'promotes' this! * * *"

Thereupon (p. 292), the bill passed the House by a vote of 121-51; it was duly signed by the President, and it became the Act of December 22, 1869, c. 3, 16 Stat. 59; see pp. 64, 65-66, *supra*.

Two months later, on February 25, 1870, Butler of Massachusetts introduced H.R. 1335, 41st Cong., 2d sess. "A Bill to admit Georgia to Representation in Congress" (p. 1570).

The debates (pp. 1701-1720) centered on the status of Georgia: Was it a State? And was it not once before already readmitted?

Mr. Bird, in opposition, waxed sarcastic (p. 1721):

> "* * * Have you looked into this Constitution with anxious undistorted eyes to determine whether or not every negro is securely provided for, so that he will not in all the coming ages, bear any unnecesary burden? Are you quite sure that he has vouchsafed to him all the inalienable, indefeasible, and everlasting rights of man, social, religious, and educational? There is no telling how soon some favoured colored individual or suddenly converted Union man or someone willing to identify his interests with her sons and sacrifice himself to a seat in Congress, may be the subject of rebellious assault or deprived of some chief pre-eminence becaure of some defect, inadvertence, or indiscretion in this Constitution. Now is the time to do or undo. There should be no fear or hesitation about completing this work so auspiciously begun."

An amendment by Mr. Bingham, reading as follows—

> "*Provided*, That nothing in this act contained shall be construed to vacate any of the offices now filled in the State of Georgia, either by the election or by the appointment of the Governor thereof by and with the consent of the senate of said State; neither shall this act be construed to extend the official term of any officer of said State beyond the term limited by the Constitution thereof dating from the election or appointment of such officers; nor to deprive the people of Georgia of the right under their constitution to elect Senators and Representatives of the State of Georgia in the year 1870; but said electron shall be held in the year 1870 either on the day named in the constitution of said State or such other day as the present legislature may designate by law,"

passed by 115-71 (p. 1770), and shortly thereafter the bill passed the House, 125-55 (P. 1771).

There followed lengthy debate in the Senate, revolving around the theme of Georgia's status (pp. 1924-1930, 1950-1960, 1987-1996, 2018-2026).

Senator Williams continued the debate on the Bingham amendment, which resolved itself into an argument over whether the existing Georgia legislature could "perpetuate itself in office" (p. 2058). Then, at p. 2059, Senator Williams quoted twice from the provisions of the Georgia constitution setting up the 44 senatorial districts (*supra*, pp. 58, 61-62), saying:

> "* * * Paragraph two of section one also has a bearing on this subject: 'The members of the senate shall be elected for four years except that the members elected at the first election from the twenty-two senatorial districts numbered in this constitution with odd numbers shall only hold their office for two years.' It will be observed that this paragraph relates expressly to the first election which takes place under the constitution and it provides that the members of the senate elected at the time shall hold their office one-half for four years and one-half for two years from that particular time and that is the time specified in the Constitution. 'The members of the senate shall be elected for four years except that the members elected at the first election from the twenty-two senatorial districts numbered in this constitution with odd numbers shall only hold this office for two years.'"

The debate continued for some time. Finally, on April 19, 1870, Senator Pomeroy offered an amendment in lieu of the Bingham amendment, in effect an entirely new bill, which provided "that the existing government in the State of Georgia is hereby declared to be provisional," and should continue under the Reconstruction Acts as a military district (supra, pp. 56-57) until an election to be held on November 15, 1870. This amendment passed, 34-24 (p.

2820), whereupon the amended bill passed shortly thereafter, 27-25 (p. 2829).

The House then concurred in the Senate's action with an amendment (p. 4797)—which changed the substance of what had been done. That amendment provided—

> "That the State of Georgia having complied with the reconstruction acts and the fourteenth and fifteenth articles of amendment to the Constitution of the United States having been ratified in good faith by a legal legislature of said State it is hereby declared that the State of Georgia is entitled to representation in the Congress of the United States. But nothing in this act contained shall be construed to deprive the people of Georgia of the right to an election for members of the General Assembly of said State as provided in the constitution thereof."

The Senate thereupon added a further amendment (p. 5583):

> "and nothing in this or any other act of Congress shall be construed to affect the terms to which any officer has been appointed or any member of the General Assembly elected as provided by the constitution of the state of Georgia."

The House concurred (p. 5586), and the measure as thus amended and re-amended became the Act of July 15, 1870, *supra*, p. 57.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 307

MABEL V. ROMAN, Clerk of the Peace for New Castle County; WALTER A. HANDSBERRY, Clerk of the Peace for Kent County; I. ROBERT WILLEY, Clerk of the Peace for Sussex County; *et als.*, *Appellants*,

v.

RICHARD SINCOCK, *et als.*

On Appeal from the United States District Court for the District of Delaware

RECORD APPENDIX TO BRIEF FOR THE APPELLANTS

[Cited as "Del. App."]

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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1. Opinion of the Supreme Court of Delaware, May 6, 1963

Opinion of the Justices of the Supreme Court in Response to Questions Propounded by the Governor of Delaware.

To His Excellency Elbert N. Carvel,
Governor of Delaware:

Receipt is acknowledged of your letter of April 22, 1963, requesting the opinion of the members of this Court upon two questions therein set forth.

These questions concern the provisions of the recent amendment to Article II of the Constitution of Delaware,

effective January 17, 1963, relating to the composition of the houses of the General Assembly of the State.

Section 5 of the amendatory act adds to Section 2 of Article II a new Section 2A. This new Section 2A creates additional representative districts. Any existing district with a population in excess of 15,000 is entitled to an additional Representative for each additional 15,000 of population or major fraction thereof. Each such representative district is to be subdivided into new districts from which the representatives shall respectively be chosen. The redistricting is to be done after each federal decennial census.

The task of subdividing the districts is to be done by a Redistricting Commission consisting of the Governor and the State Chairmen of the two principal political parties.

It is next provided as follows:

> "Within 120 calendar days following the official reporting to the President of the United States of each decennial census, (or within 120 calendar days after this amendment takes effect) the Governor, on behalf of the Commission, shall file with the Secretary of State the plan for redistricting and reapportioning as provided for herein. Forthwith, after the filing, the Governor shall issue a proclamation of redistricting and reapportioning. The Secretary of State shall cause such proclamation to be published in two newspapers of general circulation within the State for two consecutive weeks, within 20 days after the issuance of the proclamation. The proclamation shall become effective within 30 days of its issuance."

We understand the fact to be that as of the date of your letter you had not, on behalf of the Redistricting Commission, filed with the Secretary of State the required plan, which, we are informed, had not then been agreed to. The period of 120 calendar days prescribed by the statute will expire May 16, 1963.

On April 17, 1963, the United States District Court for the District of Delaware filed an opinion in the case of *Richard Sincock, et al., Plaintiffs, v. William Duffy, Jr., et al., Defendants*, Civil Action No. 2470, holding that the provisions of Section 2 of Article II of the Constitution of the State of Delaware, as originally set forth in the Constitution of 1897, and as amended by the act of January 17, 1963, are unconstitutional under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

In the light of the foregoing, you ask the following questions:

> "1. Is the Governor required to issue a proclamation of redistricting and reapportioning pursuant to Section 2, Article II, Constitution of the State of Delaware, on or before May 17, 1963, assuming the status of this case remains the same on May 17, 1963, as it is on this date?
>
> "2. Are there any reasonably foreseeable events which might occur prior to May 17, 1963, which would reverse such opinion as you render on Question 1, such as the issuance of a final decree by the United States District Court, motion for reargument before said District Court, an appeal to the United States Supreme Court?

Since the date of your letter the District Court has entered a judgment in the case above referred to. A copy of that judgment is enclosed.

The judgment is a declaratory judgment, and no other relief is as yet granted to the plaintiffs. In particular, no injunction has been granted, although the court has reserved jurisdiction to do so hereafter if it shall deem such relief necessary and proper.

The first question you have posed is based upon the assumption that the status of the case in the District Court

remains the same on May 17. Since the status of the case has been changed by the entry of judgment, your first question is moot.

The second question concerns, in effect, the duty of the Governor under the new Section 2A of Article II of the Constitution in respect of the filing and promulgation of the redistricting plan referred to in the Section. In the light of the decision of the Federal District Court in the *Sincock* case, should the Governor take the steps contemplated by Section 2A, or should he treat the section as completely void and of no effect?

It is apparent from the judgment itself that the case is not finally disposed of. By paragraph 3 all pending motions are held in abeyance. Moreover, the judgment cannot be regarded as final, for the present purpose, because an appeal may be taken within the time allowed for the purpose, and it is possible that the judgment may be reversed or modified. Until the time for appeal has passed, therefore, it cannot be said that the judgment is final for all purposes. Compare *Steiner v. Simmons*, 35 Del.Ch. 83, 89.

Finally, no injunctive relief has been granted, as above noted.

In these circumstances, particularly since the Governor is not a party to the suit in the District Court, we are of opinion that it is the duty of the Governor to obey the mandate of Section 2A and to proceed with the steps therein set forth.

We venture to add, however, a suggestion with respect to the proclamation contemplated by Section 2A. If and when it is issued, it should, we think, make specific reference to the holding of the Federal District Court, and to the serious doubt as to validity that must attend any further stops under Section 2A. Such a course seems

to us to be desirable for the information of the citizens of the State, and also as a seemly manifestation of regard for the decision of the District Court of the United States for the District of Delaware.

Respectfully submitted,

s/ CLARENCE A. SOUTHERLAND
Chief Justice
s/ DANIEL F. WOLCOTT
Associate Justice
s/ CHARLES L. TERRY, JR.
Associate Justice

May 6, 1963.

---

2. Proclamation of the Governor of Delaware, May 17, 1963

STATE OF DELAWARE

[STATE ARMS]

EXECUTIVE DEPARTMENT

PROCLAMATION

WHEREAS, an amendment to Section 2, Article II of the Constitution of the State of Delaware became effective January 17, 1963; and

WHEREAS, said amendment provides that the Governor shall, within 120 calendar days after the effective date of said amendment, file a plan for redistricting and reapportioning with the Secretary of State and shall forthwith issue a proclamation of redistricting and reapportioning; and

WHEREAS, the United States District Court for Delaware has declared said constitutional amendment to be in conflict with the Constitution of the United States of America and therefore null and void; and

WHEREAS, the Supreme Court of the State of Delaware has advised the Governor that the decision of the United States District Court is not final until the deadline for appeal has passed, and further advised that the Governor should in the meantime carry out the provisions of Section 2, Article II of the Constitution of the State of Delaware:

NOW, THEREFORE, I, Elbert N. Carvel, Governor of the State of Delaware, do hereby proclaim a plan of redistricting and reapportioning as follows:

1. The *Second Representative District* of New Castle County is hereby divided into two new Representative Districts as follows:

District "A" shall consist of all that portion of the said Second Representative District north of a line beginning at the intersection of the northwestern boundary of the City of Wilmington and the center line of Concord Avenue, thence southeasterly along the center line of Concord Avenue to its intersection with the center line of Twenty-third Street, thence easterly along the center line of Twenty-third Street and its center line extended to the Delaware River.

District "B" shall consist of all that portion of the said Second Representative District not included in District "A".

2. The *Fifth Representative District* of New Castle County is hereby divided into two new Representative Districts as follows:

District "A" shall consist of all that portion of the said Fifth Representative District east of a line beginning at the intersection of the center line of Eighth Street and the center line of Clayton Street, thence southerly along the center line of Clayton Street to its intersection with the southern boundary of the City of Wilmington.

District "B" shall consist of all that portion of the said Fifth Representative District not included in District "A".

3. The *Sixth Representative District* of New Castle County is hereby divided into four new Representative Districts as follows:

District "A" shall consist of all that portion of the said Sixth Representative District bounded by a line beginning at the intersection of the Delaware River and the northern boundary of the State of Delaware, thence along the boundary of the State of Delaware to its intersection with the center line of the Baltimore and Ohio Railroad right-of-way, thence southwesterly along the center line of the Baltimore and Ohio Railroad right-of-way to its intersection with the center line of Silverside Road, thence easterly along the center line of Silverside Road to its intersection with the center line of Holly Oak Road, thence easterly along the center line of Holly Oak Road and its center line extended to its intersection with the Delaware River, thence northeasterly along the Delaware River to the point of the beginning.

District "B" shall consist of all that portion of the said Sixth Representative District east of the center line of the Baltimore and Ohio Railroad right-of-way and not included in District "A".

District "C" shall consist of all that portion of the said Sixth Representative District east of a line beginning at the intersection of the center line of Concord Pike and the boundary of the City of Wilmington, thence northerly along the center line of Concord Pike to its intersection with the center line of Foulk Road, thence northeasterly along the center line of Foulk Road to its intersection with the northern boundary of the State of Delaware, and not included in Districts "A" and "B".

District "D" shall consist of all that portion of the said Sixth Representative District not included in Districts "A", "B" and "C".

4. The *Seventh Representative District* of New Castle County is hereby divided into three new Representative Districts as follows:

District "A" shall consist of all that portion of the said Seventh Representative District north of a line beginning at the intersection of the center line of the Lancaster Turnpike and the center line of North duPont Road, thence southerly along the center line of North duPont Road to its intersection with the center line of Faulkland Road, thence westerly along the center line of Faulkland Road to its intersection with Chestnut Run, thence southerly along the course of Chestnut Run to its intersection with the center line of the Kirkwood Highway, thence westerly along the center line of the Kirkwood Highway to its intersection with the Red Clay Creek.

District "B" shall consist of all that portion of the said Seventh Representative District south of a line beginning at the intersection of the center line of Maryland Avenue and the southern boundary of the City of Wilmington, thence southwesterly along the center line of Maryland Avenue to its intersection with the center line of Boxwood Road, thence westerly along the center line of Boxwood Road to its intersection with the center line of Dodson Avenue, thence along the center line of Dodson Avenue and its center line extended to its intersection with the center line of the Baltimore and Ohio Railroad right-of-way, thence easterly along the center line of the Baltimore and Ohio Railroad right-of-way to its intersection with the western boundary of the Town of Elsmere, thence northerly along the boundary of the Town of Elsmere to its intersection with the center line of the Kirkwood Highway, thence westerly along the center line of the Kirkwood Highway to its intersection with the Red Clay Creek.

District "C" shall consist of all that portion of the said Seventh Representative District not included in Districts "A" and "B".

5. The *Eighth Representative District* of New Castle County shall be divided into two new Representative Districts as follows:

District "A" shall consist of all that portion of the said Eighth Representative District bounded by a line beginning at the intersection of the Red Clay Creek and the center line of Faulkland Road, thence westerly along the center line of Faulkland Road to its inter-

section with the center line of Duncan Road, thence southerly along the center line of Duncan Road to its intersection with the centerline of Milltown Road, thence westerly along the center line of Milltown Road to its intersection with the center line of Limestone Road, thence northerly along the center line of Limestone Road to its intersection with Mill Creek, thence southerly along the course of Mill Creek to its junction with White Clay Creek, thence easterly along the course of the White Clay Creek to its junction with the Red Clay Creek, thence northerly along the course of the Red Clay Creek to the point of the beginning.

District "B" shall consist of all that portion of the said Eighth Representative District not included in District "A".

6. The *Tenth Representative District* of New Castle County shall be divided into three new Representative Districts as follows:

District "A" shall consist of all that portion of the said Tenth Representative District south of a line beginning at the intersection of the center line of Blue Hen Road extended and the Delaware River, thence westerly along said extended center line of Blue Hen Road to its intersection with the center line of New Castle Avenue, thence southerly along the center line of New Castle Avenue to its intersection with the boundary of the Town of New Castle, thence south and westerly along the boundary of the Town of New Castle to its intersection with the center line of Basin Road, thence northwesterly along the center line of Basin Road to its intersection with the Christiana River.

District "B" shall consist of all that portion of the said Tenth Representative District bounded by a line beginning at the intersection of the center line of Landers Lane and the center line of New Castle Avenue, thence southerly along the center line of New Castle Avenue to its intersection with the boundary of the Town of New Castle, thence south and westerly along the boundary of the Town of New Castle to its intersection with the center line of Basin Road, thence northwesterly along the center line of Basin Road to its intersection with the Christiana River, thence northeasterly along the course of the Christiana River to its interseetion with the southern boundary of the City

of Wilmington, thence easterly along the southern boundary of the City of Wilmington to its intersection with the center line of South Market Street, thence southerly along the center line of South Market Street to its intersection with the center line of the duPont Boulevard, thence southwesterly along the center line of the duPont Boulevard to its intersection with the center line of the Road (Route 40) leading to the Delaware Memorial Bridge, thence easterly along the center line of said Road (Route 40) leading to the Delaware Memorial Bridge to its intersection with the center line of Landers Lane, thence southeasterly along the center line of Landers Lane to its intersection with the center line of Linstone Avenue, thence southeasterly along the center line of Linstone Avenue to its intersection with the center line of Glen Avenue, thence southwesterly along the center line of Glen Avenue to its intersection with the property line of the Colwyck Junior High School, thence easterly along the property line of said school to its intersection with the center line of Landers Lane, thence southeasterly along the center line of Landers Lane to its intersection with the center line of New Castle Avenue, the point of the beginning.

District "C" shall consist of all that portion of the said Tenth Representative District not included in Districts "A" and "B".

IN WITNESS WHEREOF, I Elbert N. Carvel, Governor of the State of Delaware, have hereunto set my hand and caused the Great Seal of the said State to be hereunto affixed at Dover this Seventeenth Day of May in the year of our Lord, One Thousand Nine Hundred and Sixty-three, and of the Independence of the United States of America, the One Hundred and Eighty-seventh.

/s/ ELBERT N. CARVEL
Governor

/s/ ELISHA C. DUKES
Secretary of State

3. Excerpts from the Transcript of Testimony

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 2470

RICHARD SINCOCK, et al., *Plaintiffs*

v.

WILLIAM DUFFY, JR., et al., *Defendants*

Wilmington, Delaware,
January 21, 1963

Before:

HON. JOHN BIGGS, JR., Chief Judge, Third Circuit Court of Appeals.

HON. CALEB M. WRIGHT, Chief Judge, U.S. District Court for the District of Delaware.

HON. CALEB R. LAYTON, U.S. District Court Judge.

APPEARANCES:

VINCENT A. THEISEN, ESQ. and VICTOR F. BATTAGLIA, ESQ., For the Plaintiffs.

DAVID P. BUCKSON, ESQ., Attorney General;
WARREN B. BURT, ESQ. and NORMAN A. VEASEY, ESQ., Deputies Attorney General; and
JANUAR D. BOVE, JR., ESQ., Former Attorney General, For the State Election Commissioner, the Department of Elections for Sussex County, the Clerk of the Peace for Sussex County, the Superior Court Judges and the Chancellor of the State of Delaware.

FRANK O'DONNELL, ESQ.,
For the Department of Elections for New Castle County and the Clerk of the Peace for New Castle County.

JAMES H. HUGHES, III, ESQ.,
For the Department of Elections for Kent County.

N. MAXSON TERRY, ESQ.,
For the Clerk of the Peace for Kent County.

---

447 **Leon de Valinger, Jr.**

called as a witness on behalf of the defendants, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HUGHES:

Q. What is your occupation? A. I am the State Archivist of the State of Delaware.

Q. Does that involve you in matters pertaining to the history of Delaware? A. Yes, it does.

448 Q. How long have you maintained an interest in the history of Delaware? A. Since my undergraduate days at the University of Delaware.

Q. What have been your studies pertaining to the history of our State? A. I have specialized in local government, military development in the colonial period, the publishing of local county records, among others.

Q. Did you receive a degree from the University of Delaware? A. Yes.

Q. Was it an A.B.? A. An A.B., and an M.A. in 1935.

Q. What was your field of study as an undergraduate at the University of Delaware? A. I majored in history.

Q. What was your thesis for your Master's Degree? A. "The Development of Local Government in Delaware, 1638 to 1680."

Q. After your graduation and academic work what was your occupation, what did you do from then on? A. I was

employed as the Assistant Archivist from December 15 of 1930 on.

Q. When did you become the Archivist of the
449 State? A. In October of 1941.

Q. Have you continued to hold that position until the present time? A. Yes, I have. My duties have been enlarged.

JUDGE BIGGS: Can you hear him?

MR. BOVE: Yes.

MR. O'DONNELL: Yes.

JUDGE BIGGS: Thank you.

BY MR. HUGHES:

Q. Mr. de Valinger, have you written articles, books, publications of any kind relating to the history of Delaware? A. Yes, I have.

Q. Are there many of your publications of that sort? A. I provided you with a five-page bibliography.

Q. Yes. Would you mention some of those, the chief ones that have to do with the history of our State, and in particular with the development of local government in it? A. My Master's thesis on the development of local government in Delaware is one of them. I edited the Court records of Kent County for the early part of the colonial period, 1680 to 1705.

Q. If I may, your Master's thesis was in 1935? A. 1935.

Q. Did you publish an account of the military
450 organization in Delaware during colonial times? A. Yes. That was in 1938, as I recall.

Q. That covered the period from 1638 to 1776? A. Yes.

Q. Then you mentioned the calendar of the Kent County, Delaware— A. Probate records.

Q. The probate records. That was compiled by you when, in 1944? A. Yes, I believe so.

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Q. Did you edit the Council of Safety minutes, 1775 to 1776, which was published in the Delaware history pub-

lished by the Historical Society of Delaware in 1946? A. Yes, I did.

Q. Have you edited the Rodney letters, and the Ridgely letters? A. Might I say yes, with the explanation
451 that the Rodney letters were supplemental to those previously edited by Dr. George S. Ryden.

Q. What would the subjects revealed in the Rodney and Ridgely letters be? A. The Rodney letters are largely from the Revolutionary period, and they would relate to military activities as well as governmental activities of our State at that period, whereas the Ridgely letters are most important for social, economic developments in our State for the period 1742 to 1898. The latter was a three-volume work.

Q. Did you compile a reconstructed 1790 census of Delaware, published by the National Genealogical Society Quarterly? A. Yes, I did.

Q. In 1948? A. That was based on the original assessment and tax lists of the Hundreds of the counties, because the original 1790 census for our State is not extant.

Q. Were you an editor of the publication of the debates and proceedings of the Constitutional Convention of 1896? A. Yes, I was in charge, with the responsibility for the editing and publishing of that five-volume work.

Q. I think you have recently published, or you have been the editor and publisher of a publication called
452 "Historic Houses and Buildings of Delaware"? A. That is right.

Q. In the course of your occupation as Archivist do you have the responsibility for the original records of the State of Delaware from the beginning? A. Yes. State and its political sub-divisions.

Q. All that are available. Is that correct? A. That is right.

Q. Is it correct to say that you have personally examined and studied all of those records that are available? A. May I qualify that?

Q. Yes. A. I say that I have seen most of them, the ones that have come into our custody, and particularly in the earlier year, the records of the earlier years. Some of the more recent records I have not personally seen and studied.

Q. I wanted to ask you whether you were familiar with the original sources as well as the historical publications? A. Yes, I am.

Q. Mr. de Valinger, what was the beginning of the counties, the origin of the counties of what is now the State of Delaware? A. I believe, as I have set forth in my Master's thesis, that the origin in Delaware of the
453 counties had its inception in the Dutch Judicial Districts, and that they were administered by the Schepens or the equivalent of our magistrates. They were assisted by the fiscal Schout or the equivalent of our sheriffs, and that that was carried over into the Duke of York period. The duties were practically the same, but the English titles of magistrate and sheriff were applied; and then from there they proceeded into the William Penn period.

Q. I didn't hear that last part. A. From the Duke of York period there was a transition into the William Penn period.

Q. When were the Dutch Judicial Districts created and established? A. 1673, in the brief interval they regained occupation.

Q. In the brief interval that the Dutch had— A. Regained occupation.

Q. Reoccupied, yes. When did the Duke of York acquire proprietorship? A. 1664.

Q. So then after the Dutch establishment of these judicial districts did you say that the Duke of York continued them? A. They were perpetuated.

454 Q. What were those judicial districts, Mr. de Valinger? A. The principal one was at New Castle,

the other at Upland, and the third at Whorekill, which we now know as Sussex.

Q. Upland was Chester, which is now Delaware County? A. Yes.

Q. So that there were two in what is now Delaware? A. That is right.

Q. When did William Penn acquire title or ownership of these counties? A. By deed *fiefment* from the Duke of York to William Penn, March 22, 1682.

Q. And what were the counties at that time? A. The names of the counties?

Q. Yes. A. The names of the counties were New Castle and Whorekill.

Q. They were still just two in what is now Delaware? A. Excuse me, I am wrong. I had forgotten the change in the Duke of York period. In 1680 the people of the community now known as Dover petitioned for the erection of a new county and it was named St. Jones County. Then in the William Penn period those three counties were joined by the act*ive* [of] Union to the province of
455 Pennsylvania as territories, and in 1683 William Penn renamed the two lower ones. St. Jones County became Kent County and the earlier Whorekill County which under the Duke of York period had been named Deal County then became Sussex. They were named for home counties in England.

Q. From 1680 on have the three counties on the Delaware remained the same? A. Yes, they have.

Q. In name and geographical area? A. From 1683.

Q. Was there a particular reason given for the creation of the third county in the middle of what is now a State? A. Yes, indeed. The petition set forth that because of the distances and the inconvenience and the hazards of crossing water courses and of going to Lewes to transact business it would be much more convenient for the people of the upper part of the Whorekill County to have it erected into a new county known as St. Jones and subsequently Kent.

Q. Under William Penn were there any further developments in the county government set up in what is now Delaware? A. Yes, there were considerable.

Q. What did they consist of? A. The county structure flourished. More of the officers or officials from the English County system came into being. You find overseers
456 of the highways, overseers of the roads, the tax collectors, you see the court system flourishing, and many aspects of that type. You also see the introduction of the Hundred system under William Penn.

Q. What about legislative assemblies, Mr. de Valinger? A. It certainly flourished, because you find an elective assembly coming into being. You also find the council coming into being under William Penn.

Q. An elected assembly? A. An elected assembly.

Q. What was the representational apportionment of that assembly? A. It did vary from time to time, but generally and for the most part it was six, I believe, from each of the counties.

Q. You mean it varied in number? A. It did in the early stages.

Q. Did it vary in proportions or ratios or percentages? A. To my knowledge there were no proportions or ratios. It was a strict county basis.

Q. Each county was represented equally from the time of William Penn? A. Yes.

457 Q. For how long? A. From then until the Revolution, July 4, 1776.

Q. That legislative assembly at the beginning was in connection with the province of Pennsylvania, was it not, Mr. de Valinger? A. In connection?

Q. Yes. Didn't they meet together at first? A. Yes, they met together in what was known as the General Assembly.

Q. How did the three lower counties on the Delaware become separated from the province of Pennsylvania? A. There was a long series of grievances that developed, and

as a result of these grievances the Act of—rather the Charter of Privileges of 1701 enabled the three lower counties to become separated and hold their own assembly at New Castle, and that was effectuated in 1704.

Q. This Charter of Privileges of 1701, who granted it? A. William Penn, the proprietor.

Q. From 1704 on did the three lower counties remain separate from the province? A. As far as their assembly was concerned.

Q. But continued to have the same Governor? A. Yes, indeed. Frequently the Deputy Governor presided.

458 Q. This continued, did you testify, up until the time of the Revolution? A. Yes.

Q. When the troubles began that led to the American Revolution what position did the three lower counties on the Delaware take? A. What position did they take?

Q. Yes. A. With regard to the Revolution?

Q. Yes, or what did they do? Did they participate in the Continental Congress? A. Yes, they had representatives as counties in the early Continental Congress.

Q. Did they instruct those delegates as to any position to take or how were the delegates instructed, if they were? A. Well, from time to time the issues involved would carry particular instructions, but they were from the earliest times instructed not to abrogate any of their representative rights.

Q. How many representatives were there from the counties in the Continental Congress? A. They varied, but usually we found there would be one or two and in

459 some instances all three counties could not attend.

By Judge Biggs:

Q. One or two from each county? A. Yes, sir.

By Mr. Hughes:

Q. That is what I was getting at. There would be a representative or representatives from each county? A. Yes, sir, strictly on a county basis.

By Judge Biggs:

Q. How were they selected? A. They would be selected by the Assembly that would instruct them.

Q. That is, the Delaware Assembly? A. The Delaware Assembly at New Castle.

Q. Would select individuals or delegates or whatever you call them to go to the national group or—I suppose indirectly that is a wrong statement—the federated group? A. Yes.

By Judge Wright:

Q. But when they went there they were not representatives of the three lower counties on the Delaware; they were representatives of the individual counties? A. Yes, sir.

460 By Judge Biggs:

Q. And of the State as well? A. Well, could I correct you there? They were not at that time a State.

Q. What was the situation that statewide, if I can use that term? The State had not yet been created. A. Prior to July 4 of 1776 they were still individual counties who were agreeing on these things. There was no formal organization.

Q. There was no sovereignty in the three counties? A. There was no sovereignty. They would term themselves as counties on the Delaware.

Q. They were known as the three lower counties on the Delaware; is that correct? A. Yes.

Judge Biggs: Thank you.

Mr. Bove: Your Honor said there was no sovereignty in the three counties, and I am not sure Mr. de Valinger understood.

By Judge Biggs:

Q. I said there was no sovereignty in the three counties and was that correct, and you said yes. A. I should not have said that.

Q. What would you say the answer should be? There was some sovereignty? and my question is
461 State sovereignty. A. Sovereignty would be a residual in each of the counties.

There was a Colonial Governor or a Deputy Governor? A. Yes.

Q. When the Assembly passed laws they had to be approved? A. That is true.

Q. By the Governor or the Deputy Governor? A. That is true.

Q. Was there a power of veto? A. Yes, the Governor had the power of veto.

Q. Or the Deputy Governor? A. Yes.

Q. But if he approved they became the law of the three lower counties? A. Yes, sir.

Q. You say there was a General Assembly or they met in a General Assembly? A. They had prior to their own Assembly.

Q. Prior to their own Assembly? What was the situation there? Did the General Assembly legislate for Delaware, the three lower counties? A. Yes, the repre-
462 sentatives from the three lower counties meeting with the representatives or some, I should say, from the three Pennsylvania counties of Philadelphia, Chester, and Bucks would comprise the General Assembly when the Council was in session also.

Q. Did you know as a matter of general interest that the Virgin Islands followed that proceeding until very recently? A. No, sir.

By Mr. Hughes:

Q. When you speak of the sovereignty of the counties prior to the Declaration of Independence they were colonies of Great Britain, were they not? A. I wouldn't say so. There was one time when they attempted to be colonies. They petitioned in Queen *Ann's* period, but they did not actually become that. They were proprietary holdings of William Penn.

By Judge Biggs:

Q. They could not even attain colony status? A. They had a little—well, in a way they were better off, because the laws that they enacted were subject to the approval or disapproval of the proprietor, and he was required to transmit the laws, but frequently they were never transmitted to England and they were enforced until it was brought to the attention of the authorities of the
463 Lords of Trade and Plantation and others that such a law was in effect, and by the time they would void a law of that type the Assembly would re-enact it, so that it might be three or four years that they would be perpetuating a law that had been disapproved.

By Mr. Hughes:

Q. Mr. de Valinger, what I meant to get at is you would not say that they were sovereign before the Declaration of Independence? A. Well, when I said that they were I was thinking in terms that they were able to legislate in their own behalf, in their own Assembly at New Castle. I was thinking in that term.

Q. Now, the three counties participated together in the resolution that resulted in the Declaration of Independence? A. Yes, they did.

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464 Q. Mr. de Valinger, my attention has been called to my omission to ask you in developing your qualifications about your memberships in professional societies or organizations. Have you taken part in such organizations directed towards an interest in the history and the kind of thing we have been discussing? A. Yes, indeed.

Q. What are they, Mr. de Valinger? A. I am a
465 member and director of the Historical Society of Delaware, a member of the Historical Society of Pennsylvania, and a number of smaller ones. I am a founder member of the Society of American Archivists and at present their president.

Q. These historical societies, do they sponsor publications or published periodicals? A. Yes.

Q. And is it to those periodicals that you frequently contribute your writings? A. That is right. The Historical Society of Delaware publishes "Delaware History". The Historical Society of Pennsylvania publishes the magazine of History and Biography.

Q. Now, before we suspend for lunch I think we had gotten almost up to the Declaration of Independence, Mr. de Valinger. A. Yes.

Q. I think you had testified about Delaware or the three lower counties' participation in the Continental Congress? A. That is right.

Q. What was that, Mr. de Valinger? A. They were in attendance as representatives of their counties.

466 Q. From time to time delegations from each county— A. From each county.

Q. And they participated in the debates and resolutions leading up to the Declaration of Independence? A. Yes.

Q. When that was adopted they voted there as a unit, didn't they? A. When you say "there", you mean—

Q. On the Declaration of Independence. A. We had three delegates in the Continental Congress at that time, George Read, Thomas McKean and Caesar Rodney. Thomas McKean was in favor of Lee's resolution for the Declaration. Rodney had gone to the lower part of the State as he was the equivalent of Adjutant General of the State Militia at that time supposedly to help put down a Tory rebellion. He had returned to his estate outside of Dover, and Mr. Thomas McKean's messenger reached him urging him to come to Philadelphia because George Read was opposed to Lee's resolution. So the two men in Continental Congress at that time were divided. As you will recall from our history, Caesar Rodney made his famous ride from Dover to Philadelphia and arrived in the afternoon of July 2 and voted with McKean in favor of the resolution.

Q. So that that was an act of the three counties,
467 the three lower counties, as a State, you might say?
A. I couldn't say as a State because they weren't at that time.

Q. They still were not organized as a State? A. No, they were not organized. There was no formal organization making them a State. It must have been a mutual agreement among them.

Q. And upon the Declaration of Independence the ties with England then were severed? A. They were severed.

Q. When did the three lower counties organize thmselves into a State? A. In the fall of 1776 they had a constitutional convention, and the basis of that constitutional convention was thirty delegates, ten from each county. The General Assembly meeting at New Castle provided for the election of these delegates from each of the counties.

Q. During the period between July 4, 1776 and the fall, when the constitutional convention met, what was the government of the counties on the Delaware? A. The Assembly of the three counties.

Q. They continued the former system or the system that had existed under William Penn? A. Exactly. The only substitution was omitting the name of the king and
468 inserting the three lower counties.

Q. In the fall of 1776 you say they did adopt a convention, is that true? A. A constitution.

Q. A constitution. What did I say?

JUDGE BIGGS: Convention.

MR. HUGHES: Excuse me.

BY MR. HUGHES:

Q. What did the Constitution of 1776 provide with respect to legislative assembly? A. It perpetuated the Assembly that had been begun in Penn's time and provided for a Council, which would be an upper House.

Q. Well, what was the representation in the Assembly? A. Seven from each county elected annually.

Q. And that your say would correspond to which House? A. That would be the House of Representatives, or the lower House. And for the upper House the Council was three from each county elected annually.

Q. How long did that Constitution continue in effect, Mr. de Valinger? A. Until the Constitution of 1792.

Q. What did that Constitution provide with re-
469 spect to representation? A. That Constitution provided with respect to representation a House of Representatives, seven from each county, elected annually, and the name of the upper chamber was no longer the Council but became the Senate, and it was three from each county elected annually for three years, and that Constitution, I might insert, was again formulated by a convention of thirty delegates, ten from each county.

By Judge Wright:

Q. Were the representatives elected for one year or three? A. The representatives were elected annually for one year.

By Mr. Hughes:

Q. Now, Mr. de Valinger, are there any reports of the debates or proceedings of the Constitutional Convention which you have been talking about? A. Yes, there are. There are limited ones.

Q. Limited ones? A. A limited one, an abbreviated one, for the one of 1776. In fact, it has been published by our Commission some years ago. And there is one for 1792.

Q. In those debates— A. Excuse me, that is not debates; that is a journal.

Q. Is there an indication about the proportion of
470 the representation to the various counties in the records of those proceedings? A. Not to my recollection.

Q. There was another Constitutional Convention in 1831, wasn't there? A. Yes, there was.

Q. What did that do to the representation in the General Assembly? A. Well, in the House of Representatives there were still seven from each county, and they were elected for two-year terms. The Senate had three from each county for four-year terms, and we got the beginning of biennial sessions. Again this was formulated by a State Convention, thirty delegates, ten from each county.

Q. Was there discussion in that convention about the representation in the Assembly? A. I am not sure.

Q. I see. Let us proceed on to the next convention; when was that, in 1852? A. It was 1852.

Q. Was there discussion about the proportion of representation? A. Yes. There was considerable.

Q. That was a great question in that convention,
471 was it not? A. Exactly right.

Q. What was the result of the convention? A. It was submitted to the people of the State, and it did not pass.

Q. A Constitution was submitted to the people? A. The Constitution was not accepted.

Q. It was rejected? A. That is right.

Q. Did it continue to provide for equal representation by counties? A. No. It was not to be equal because there was consideration given to the growing size of the Wilmington area.

Q. How long did the Constitution of 1831 continue in effect? A. Until the Constitution of 1897.

Q. What was the result of that convention? A. The result of that convention was that the discussion about the enlarged representation for the Wilmington area, or this northern part of New Castle County, was gone into considerably. As a result of that we have the thirty-five representative districts.

Q. Yes. Are the proceedings of that Constitu-
472 tional Convention reported at length? A. Yes, they are.

Q. How was that done? A. They were taken stenographically, and the journal was published first by the State and then just recently, as you brought out earlier today, the debates were published. Heretofore they existed only in typed copies.

Q. Yes. This was one of the publications that you edited. Is that correct? A. That is right.

Q. That Constitution of 1897, then, is the one that has been mentioned in this trial many times and without laboring it it provided for the thirty-five Representatives and seventeen Senators? A. That is right.

Q. How were they divided between the counties? I know there were fifteen Representatives from New Castle, ten from Kent and ten from Sussex. A. Yes.

Q. In the course of their discussions how were the additional five that were elected from the City of Wilmington discussed and treated? A. Mr. *Salisbury* in the debates points out that there were to be two for Wilmington.

473 Q. Two Senators. A. Two Senators. Two additional Senators.

Q. By that you mean that they spoke of equal representation between Kent, Sussex, and the rural part of New Castle County, and an additional— A. Two.

Q. —two Senators for the City of Wilmington. A. That is right.

Q. An additional how many Representatives, five? A. Yes. That is right.

Q. During the colonial days, before the independence of the American colonies, what were the functions of these county governments that sent their representatives to the General Assembly? A. The function of the county governments?

Q. Yes. A. With respect to the local government you mean?

Q. Yes. A. Well, they were very extensive. They regulated many forms of activities of the citizens of that time,

from the building of roads, the laying of taxes, the assessing and collecting of taxes, providing for the poor, and many features of that sort.

474 Q. Did they provide all the local governmental services? A. Yes. The county was the strongest governmental unit.

Q. Did those county governments do everything except legislate, that is, pass general laws? A. Yes, they did, but in a way they legislated because sending their representatives to the Assembly they legislated.

Q. I understand. But I was making a distinction between the local county governments and the General Assembly composed of their representatives, or representatives of those counties. What was the further history of the counties, the local governments, after the Revolution? A. Of course, at the time of the convention they allocated a number of their duties and responsibilities to the newly-formed State, and they still continued as the strongest local unit. They were charged with the building of the roads, and the assessing, the local governmental officials such as the coroners, the sheriffs, the constables, the recorders.

Q. Have they continued in that form to the present day? A. Partially. Their duties have eroded through the years, just as the highways have been taken away from them and allocated to the State Highway Department. We have seen the abolition of the alms houses and the creation of the Welfare Home, and in similar instances.

475 Q. Do the counties still exist, however, as present-day governmental, local governmental organizations? A. Definitely, in my mind.

Q. Mr. de Valinger, I would like you to direct your attention to the period that we spoke of somewhat earlier between the time of the Declaration of Independence and the adoption of the Delaware Constitution of 1776. The counties continued their former local governments, I think you testified? A. Yes.

Q. At that time was there any discussion to your knowledge of their doing anything except forming a State? A. There may have been, but the records have not survived; but those people did have an option. They did not necessarily have to form a State.

Q. What option did they have? A. Well, they could have joined with Maryland, they could have joined with Pennsylvania, they could have become individual governmental entities, or they could have done what they did do.

Q. When you speak of those people you are referring to the people of each of these counties? A. To the people of each of the counties.

Q. Mr. de Valinger, since you became State Archivist or Assistant State Archivist, I think it was in 1939,
476 was it? A. No, 1930.

Q. Have you lived in Delaware since that time? A. I was born in Delaware, born in Middletown, Delaware, and as a small child moved to Wilmington and was raised here, educated in the schools of Wilmington and, as you know, attended the University of Delaware.

Q. And have remained a resident of Delaware since that time? A. Yes, indeed.

Q. Are you familiar with the political history of this State and the attitudes of the representatives who have been elected to the General Assembly? A. I believe I am.

Q. Have you had occasion to observe the General Assembly in session? A. Many times. My duties require me to attend sessions of the General Assembly.

Q. In general to be familiar with what is going on in the General Assembly? A. That is right.

. . . . . .

478 Q. Mr. de Valinger, have you observed patterns of voting among the members of the General Assembly?

Mr. Theisen: Objection. It is too general.

Mr. Hughes: I would like to point out to the Court that

this type of question was asked of Professor Dolan and permitted to be answered.

JUDGE BIGGS: We will hear you, Mr. Theisen.

MR. THEISEN: Well, he is asking him a question which I think is entirely too broad and general in scope. It neither is limited by time, nor is it limited as far as I know by place, and is therefore, I think, objectionable.

JUDGE BIGGS: Well, you mean, of course, voting of members of the General Assembly at Dover, do you not?

MR. HUGHES: Yes, sir.

JUDGE BIGGS: And you mean over what period of time?

MR. HUGHES: Well, over the period of time during which he has been observing the General Assembly, which I take it from his testimony is since 1930.

JUDGE BIGGS: In other words, you are asking what he has observed in patterns of voting in the General Assembly of Delaware from 1930 through, I take it, the present time, a period of approximately thirty years plus. In other words, what has the witness observed as to voting patterns in respect to what?

MR. BOVE: Your Honor, I understood the question to be "Have you observed voting patterns in the General Assembly?". He has not yet asked what the witness observed.

JUDGE BIGGS: I think you are quite right.

MR. THEISEN: May I have the question re-read, then?

(The last question was read by the Reporter as follows:)

"Question: Mr. de Valinger, have you observed patterns of voting among the members of the General Assembly?"

MR. THEISEN: May I renew my objection?

JUDGE BIGGS: Yes. The objection is overruled. Let him answer the question.

MR. HUGHES: I think I should add I do refer, of course, to—

JUDGE BIGGS: You can ask that in other questions if you are going now to your next question.

MR. HUGHES: I am adding the qualifications that the Court brought out.

480 JUDGE BIGGS: I want a separate question so that we can rule on it.

MR. HUGHES: I will withdraw the previous question.

JUDGE BIGGS: No, don't withdraw the previous question. That is now of record.

JUDGE WRIGHT: Your question is very limited. You have asked him if he has observed the legislature. When he answers that you get down to the meat of the thing. What is it you want him to testify to that he observed, the color of their hair, the color of their eyes, or just what?

JUDGE BIGGS: As to patterns of voting.

(The question was read by the Reporter again as follows:)

"Question: Mr. de Valinger, have you observed patterns of voting among the members of the General Assembly?" A. Yes, I have observed patterns of voting.

JUDGE BIGGS: Your next question, now.

BY MR. HUGHES:

Q. Mr. de Valinger, during your observation of the General Assembly since 1930 in its sessions at Dover at the House and Senate of the General Assembly of Delaware what have you observed to be the patterns of voting of members from the lower part of the State, the lower

481 two counties and the lower part of New Castle County, as opposed to those of the members from the northern part of New Castle County?

MR. THEISEN: Again I must object, your Honor. What he has observed of general patterns of voting with regard to upper and lower Delaware is not a bit relevant to anything here. If it is a specific type of voting pattern that he is interested in then I might withdraw my objection. But just a general statement, it might be concerned with whether they do or do not like muskrats on Saturday or

Sundays or something completely irrelevant to these proceedings.

JUDGE BIGGS: There is a great deal of irrelevant material in this record, Mr. Theisen. I would overrule the objection. We assume this will be made relevant to some of the issues here. We will take it subject to that, overruling the objection.

MR. HUGHES: If the Court please—

JUDGE BIGGS: Well, we have allowed it.

(The last question was read by the Reporter.)

A. Despite the size of our small State, I have observed differences of interest. For example—

JUDGE BIGGS: That is not responsive.

BY JUDGE BIGGS:

Q. Differences of interest in respect to voting? A. In voting on issues.

482 Q. In other words, you have observed differences in voting patterns due, you believe, to the difference of respective interests? A. Yes, sir.

. . . . . .

Q. What issues have you observed this type of thing in connection with? A. For example, the representatives of New Castle County are in favor of the county zoning. As yet it has not been approved by the representatives from Kent or Sussex. It is under consideration, has been at previous sessions, but as yet it has not been approved.

Another instance is that the people, or the representatives from Kent and Sussex, are often opposed to eminent domain. They are not favorable toward the calling of a new Constitutional Convention. They have opposed

483 controlled access highways as proposed by the State Highway Department. They are more interested in agriculture than the citizens of New Castle County. They take a much more active and decided interest in fish and

game laws. The majority of them are introduced by representatives from the lower counties. They have manifested that they are much opposed to the right to work bill, and subjects of that type.

Q. In those fields then you have detected a difference in attitude? A. Yes, I have.

Q. Of the representatives from the lower part of the State as opposed to the attitudes of the representatives from the northern part of the State? A. Yes, I have.

Q. One final question then, Mr. de Valinger: You testified that the functions of the county governments had remained more or less the same but that some of their duties had eroded or been abandoned? A. That is right.

Q. Has there been any change in the other direction, that is, toward adding some duties or functions? This would cover, if I may add, the period during which you have testified, say, since the formation of the Delaware State in 1776. A. I would say not in Kent or Sussex
484 but in New Castle County I believe they have had drainage added to them in more recent years. They did in the earlier colonial periods have that as a duty, but not in between this period.

Q. Well, there have been then some functions added to them—

JUDGE BIGGS: Well, that one. Are there any others?

BY MR. HUGHES:

Q. Are there any others that you can think of, Mr. de Valinger? A. Well, in the colonial period and the early Revolutionary period of course the constables and the sheriffs acted as a police force, and we do find now in modern times a county police force in New Castle County that you do not have in Kent or Sussex.

MR. HUGHES: Cross-examine.

BY JUDGE BIGGS:

Q. One question. It is hardly relevant, but I would like to have the answer. Didn't Caesar Rodney cast the

deciding vote? A. Yes, your Honor. It not only was the deciding vote in our delegation but also in the convention.

JUDGE BIGGS: Thank you. Would you proceed, Mr. Theisen?

MR. THEISEN: Yes, sir, I shall.

485 CROSS-EXAMINATION

BY MR. THEISEN:

Q. Mr. de Valinger, I believe you said that you edited or rather worked with the first census figures of 1790? A. Yes, sir.

Q. You are then familiar with the population, are you not, of all three of the counties at that time? A. I was familiar with those figures then, when I worked with them.

Q. Are you not now familiar with them? A. No, I am not.

Q. Well, do you have a recollection as to whether they were pretty near equal in number? A. At 1790 they were, approximately.

Q. Well, weren't they actually 18,000, 19,000, in that area, each of them? A. In the 2,000 bracket.

Q. I beg your pardon? A. I would say within 2,000 bracket.

Q. Well, if I suggest they are within 1,000 bracket, would that sound off to you?

MR. BOVE: The witness has testified on that to his knowledge. Maybe Mr. Theisen's knowledge is different.

JUDGE BIGGS: Mr. Theisen, you can certainly sug-
486 gest this, but these figures are certainly susceptible of proof. I think the Court could take judicial notice of them if you desire to put them in the record that way. We do not object; we are not preventing you from continuing.

MR. THEISEN: I was testing his recollection as to what those figures were.

By Mr. Theisen:

Q. Mr. de Valinger, in the work "Delaware, the First State", which I am sure you are familiar with, the one edited by Mr. Reed— A. Yes.

Q. On page 261 of that volume the census figures for 1790 for the three counties are as follows: New Castle, 19,686; Kent County, 18,920; Sussex County, 20,488; a total population of 59,094. Is that your recollection? Does that refresh your recollection, those figures? A. That is the reason I said about 2,000.

Q. Are you familiar with the population figures of the three lower counties at the time, let's say, of independence? A. No, I am not. I wouldn't want to rely on my memory for that.

Q. Well, does your memory serve you well enough to say that they were about equal in population at that time also?

A. Yes.

487 Q. Do you know any of the population figures for the period preceding the Declaration of Independence? A. No, I do not.

Q. May I take you back a few years prior to the Declaration of Independence and call your attention to the end of the seventeenth century and frame my question to the lower counties and ask you if you can recall and recite to the Court what the grievances were that led to the separation of the three lower counties from the proprietary Penn colonies? A. May I read from this volume?

Q. Well, I am asking you first, Mr. de Valinger, as a historian, do you know what those grievances were? A. Yes, I know what some of them were.

Q. Well, may I ask you if it wasn't a fact that one of the determining grievances for separation from Pennsylvania was the fact that this burgeoning Philadelphia metropolis was demanding more representations in the Assembly? A. That is not my interpretation of it.

Q. May I read to you from Reed's book, page 260, and

ask for your comments upon this. The author states, beginning on the bottom of page 260 and running over to 261:

"Another obstacle to literal majority rule in Delaware government remains to be mentioned, the lack of representation according to population. This is true of
488 both Houses of the Legislature, and the reason for it is historical. In the Assembly set up by Penn which introduced representative government into Delaware each colony was allowed an equal number of members, and so it has remained ever since. When at the end of the seventeenth century the growing metropolis of Philadelphia demanded increased representation, the Delaware county seceded and set up a separate legislature in 1704."

Does that refresh your recollection as to one of the reasons, one of the compelling reasons, why they seceded and set up their government?

. . . . . .

A. I will be glad to answer that and say that on April 12 of 1701 the Charter of Privileges was granted by proprietor Penn, and one of the privileges was that if there was a separation of the three lower counties from Pennsylvania, from the province of Pennsylvania, the upper counties might be allowed to expand their representation in their own Assembly, and the Delaware—or three-
489 lower county Assembly to be established at New Castle could determine their own representation. But this was not the cause of the separation; this was conditional on the fact if they did do that.

. . . . . .

Q. Was this one of the grievances that led to the separation? A. It may have been one of the grievances.

Q. Now, then, at that time, and until 1776, the three lower colonies were, as I understand from the history and from your testimony, they remained as proprietary holdings of the Penn family, did they not? A. They did.

Q. So they were not at that time, and had not been until that time, any sovereign power, had they? A. It depends upon the definition of "sovereignty" in this instance.

Q. They were owned by Penn and his family, weren't they? A. They were owned by them.

Q. And they were governed by the representatives—the top governing official was a direct representative of William Penn's family, was it not? A. Yes, but there were breakdowns in the Penn system; for example, the
490 whole *quick* [quit] rent system that they had imposed broke down, and there were other aspects of it.

Q. By the way, where was Thomas McKean from? A. New Castle County.

Q. Where was George Read from? A. New Castle County.

Q. So that the three lower counties were not represented in the Continental Congress by representatives from each of the three lower counties, were they? A. Not at that particular time.

By Judge Biggs:

Q. I have always thought that George Read lived just outside of Dover. Am I wrong? A. He lived in New Castle.

Q. Lived in New Castle, the town of New Castle? A. Yes.

By Judge Wright:

Q. When did he move into that house down there, isn't there a house near there, George Read? A. Outside of Dover?

Q. Yes. A. May I suggest you are thinking of John Dickinson.

Judge Biggs: The Court is obviously not well equipped with Delaware history. Pardon me, Mr. Theisen.
491 Mr. Theisen: It is quite all right, your Honor.

Judge Biggs: In these matters I suppose ignorance is preferable to apathy, is it not?

MR. THEISEN: Yes, I should think so. It is remarkable how one's history gets sharpened when one gets into a case like this.

JUDGE BIGGS: Yes, and how one forgets it quickly.

MR. THEISEN: Yes.

BY MR. THEISEN:

Q. When we move into a different type of government, we move into the Constitution of 1776, didn't that Constitution, which was the first one as a State, provide for a bicameral system? A. Yes, it did.

Q. Hadn't the systems prior to that been—strike that. Weren't the members of that bicameral body elected from the counties at large? A. When you say "at large," do you mean from all three counties?

Q. No. From each county. Did you say each county elected its representation at large from that county? A. Yes.

Q. Isn't that correct? A. That is right.

492 Q. That continued, did it not, through the Constitution of 1792? A. Yes, it did.

Q. The delegates to these conventions were elected at large, were they not? A. Within their counties.

Q. In 1792. Yes. Now, then, in the Constitution of 1792 what provision, if any, was made to allow for the expansion of the House and Senate in the event of an increase in population? A. I am not aware that there was any.

Q. Are you aware or you are not aware then of the fact that the Constitution of 1792 permitted the House and Senate by a two-thirds vote to increase the size of their membership? A. I do recall that they could do that.

Q. That is correct, is it not? A. Yes.

Q. So as early as 1792 this State was looking forward to expansion because of growth in population. Isn't that correct? A. Yes.

Q. The Constitution, the next one that we speak of, is the Constitution of 1831. Is that correct? A. That
493 is correct.

Q. Do you know the population of the State of Delaware by 1830? A. No, I do not.

Q. Do you know what motivated the call of the convention of 1831? A. I am not sure. I would think that perhaps it might be the beginning of industrialization in the State.

Q. Was it the beginning of the demand of the northern part of the State to have additional recognition? A. I do not recall reading anything to that point.

Q. You do not know whether that is so or not? A. I do not know.

Q. Now, then, following the promulgation of the convention of 1831 the Representatives and Senators continued to be elected at large, were they not? A. Yes.

Q. In the counties. A. Yes.

Q. Now, do you know, as a historian, what happened to the population of this State between 1840 and 1850? A. I know that it increased considerably.

Q. Where? A. In the northern part of the State.
494 Q. Is it not a fact that it burgeoned and started expanding tremendously in the northern part of the State? A. Yes. That is right.

Q. As a historian are you aware of what occurred in the early fifties with regard to demands on the part of the northern part of the State for additional representation? A. I know that there were demands for it, for representation.

Q. In 1850 wasn't a Governor elected on the basis or on a platform that there would be a constitutional convention to give additional representation to the northern section? A. I believe so.

Q. Wasn't there, in fact, a series of resolutions adopted in the legislature calling for a constitutional convention? A. I do not know that.

Q. One was called, was it not, in 1853? A. Yes, 1852, as I recall.

Q. '52. There was an amendment to our Constitution, was there not, or at least a draft was proposed and adopted by a convention? A. A new Constitution.

Q. What did that Constitution have to say with regard to the representation of the City of Wilmington? A.

495 Mr. Bayard's address called for—called attention to the expanded population and called for additional representation.

Q. As a matter of fact, that Constitution or the draft of the Constitution that was adopted did give additional representation to Wilmington, did it not? A. Yes, it did.

Q. And that Constitution was taken to the people, was it not? A. Yes, it was.

Q. Do you know the reason it was defeated? A. I do not know why it was defeated.

Q. At any rate it was defeated, was it not? A. It was defeated.

Q. So here again in 1852 or '53 there was early agitation on the part of the people in the City of Wilmington for alequate representation in our General Assembly. Isn't that correct? A. That is correct.

Q. Now, then, the next Constitution that we have discussed is the Constitution of 1897, and you prepared and helped, assisted in printing the debates of that Constitution. A. I did.

496 Q. I am sure you are familiar with them? A. Yes.

Q. I ask you whether or not there weren't repeated requests on the floor of that constitutional convention for additional representation for the swollen population of the City of Wilmington? A. There was.

Q. And as a result of that agitation Wilmington did get representation, did it not? A. Yes.

Q. And the two Senators that Wilmington got that were added to New Castle County were really Wilmington Senators, were they not? A. Yes, they were.

Q. And the five Representatives that they got were really Representatives not from New Castle, but from the City of Wilmington; isn't that correct? A. I have not been able to substantiate that point. Mr. Salisbury's statement was that the two additional Senators were from Wilmington. I have not seen the statement that the five additional Representatives were. We assumed that.

Q. Well, you assumed that? A. Yes.

Q. There is nothing to the contrary to assume
497 otherwise? A. No.

Q. Now, the Constitution of 1897 was not submitted to the people for ratification, was it? A. No.

Q. Are you aware that the Enabling Acts leading to the call of that convention provided that it should be submitted to the people for ratification? A. No, I was not aware of that.

Q. Do you recall sometime ago receiving a telephone call from me asking that I be provided with a copy of the original Article 2, Section 1 and Section 2 of the Constitution of 1897? A. Actually I do not recall.

Q. I hand you a document and ask you if that is your signature? I hand you three of them, as a matter of fact.

JUDGE BIGGS: Three documents?

MR. THEISEN: Triplicates of the same.

A. Yes, this is my signature stamp.

BY MR. THEISEN:

Q. Is that your signature? A. No.

Q. You did not sign that personally? A. No.

498 Q. Is your office authorized to authenticate documents in that manner? A. Yes.

Q. And is this truly an authenticated copy of what it purports to be? A. Yes, it is.

Q. What do those documents purport to be? A. Article 2, Sections 1 and 2, Constitution of 1897.

Q. Would you kindly hold one of those documents in

your hand? Would you point out to me where Paragraph 2 of Article 2—

JUDGE BIGGS: Just a moment. Have you examined these, Mr. Bove?

MR. THEISEN: Excuse me.

JUDGE BIGGS: Any objection?

MR. BOVE: None, sir.

JUDGE BIGGS: Let it be marked as an exhibit. This is cross-examination, but we will admit it out of order.

MR. BOVE: We have no objection.

(The photostatic copies of Article 2, Sections 1 and 2 of the Constitution of 1897 were received in evidence and marked "Plaintiffs' Exhibit No. 23.")

BY MR. THEISEN:

Q. Mr. de Valinger, would you be kind enough to
499 mark on the copy that you have in your hand where Paragraph 2 of Section 2 of that Article is to be found? Paragraph 2 of Section 2. A. You want me to mark where it is to be found?

Q. Yes, would you please show us where that is?

JUDGE BIGGS: Just take a pencil and mark it.

BY MR. THEISEN:

Q. You were pointing then to Section 2, were you not? A. Yes.

Q. My question is would you show me where Paragraph 2 of Section 2 is to be found? Paragraph 2, Section 2.

JUDGE BIGGS: What page?

MR. THEISEN: I am asking the witness to indicate what page that occurs on, your Honor.

JUDGE BIGGS: I think it is page 11, is it not?

THE WITNESS: You are asking for Paragraph 2—

MR. THEISEN: May I strike that last question?

By Mr. Theisen:

Q. Would you please indicate on there where Paragraph 1 and Paragraph 2 of Section 2 of Article 2 are to be found? Do you understand the question? A. Yes.

Q. Paragraph 1 of Section 2 and Paragraph 2 of
500 Section 2. A. I don't see any paragraphing, anything that indicates that there is a Paragraph 2.

Q. You do not see any Paragraph 3 in that handwritten copy of the Constitution? Is that the true and correct copy of the Constitution of 1897? A. Yes, it is.

By Judge Biggs:

Q. Just a moment. Let me interrupt. I am not talking now as to whether this is in haec verba—that is, in the same language. This is sort of a copy affair. Is this the original copy, a photostatic copy of the original document page for page? A. Yes, sir.

Q. In other words, this is not a photograph? A. This is a photostatic copy.

Q. Of the original? A. Of the original.

Judge Biggs: Thank you.

By Mr. Theisen:

Q. Where do you find Paragraph 1 of Section 2 of Article 2? A. From the indentation I would presume it begins with the words "The House of Representatives."

Q. Would you mark that No. 1 for me, please, in
501 pencil? A. May I ask counsel if I should?

Judge Biggs: You may certainly mark it.

(The witness complied.)

By Mr. Theisen:

Q. Now would you indicate where Paragraph 2 starts?

* * * * * * * * * * *

502 A. Yes, I would presume that on page 13 No. 2 might be it.

By Mr. Theisen:

Q. Starting with the words what? A. "No. 2, All that portion of the said city included"—

Q. "All of that portion of the said city included"? Thank you very much.

By Judge Biggs:

Q. Mr. de Valinger, I understand you testified that this was a photographic copy of the original? A. Yes, sir.

Q. Isn't there on file and wasn't there signed a printed copy of the original? A. No, sir. This was the original manuscript that was filed.

503 Q. And signed? A. Yes.

Q. By the chairman and the members and the secretary and so forth? A. Of the constitutional convention, your Honor.

Judge Biggs: Thank you.

By Mr. Theisen:

Q. Mr. de Valinger, may we now go on to these patterns of voting differences that you say you have observed between the northern area representatives and those in Kent and Sussex Counties? I believe you have stated that in the years that you have observed the action of the General Assembly of the State—and this goes back to 1931, does it? A. Yes.

Q. Until the present day you have detected a difference of interests in a number of fields; is this correct? A. That is correct.

Q. And has this vote that you say has been diametrically opposed one to the other, has this persisted over the years since 1931 to the present time?

Judge Biggs: I don't think the witness used the phrase "diametrically opposed." This is proper cross-examination, but we have Mr. de Valinger here as an expert. "Opposed" I think is the phrase the witness used, and I

would like to have this point perfectly clear. I think
504 if is one of very substantial importance. So I suppose the question will be stricken unless—

MR. THEISEN: Strike the question.

BY MR. THEISEN:

Q. Mr. de Valinger, these differences of interest that you have observed in voting patterns between the upper county and the lower two counties, have these been differences that are just shades of differences or have they been directly opposed one to the other? A. In some instances they have been directly opposed one to the other.

Q. Would you use the word "diametrically opposed" in that case? A. No, I prefer it as I have stated it.

Q. Directly, all right. What are the issues that you have observed through the years in which there has been direct opposition? A. There has been direct opposition to zoning.

Q. Where is that zoning? What area of zoning are we talking about? A. We are talking about county zoning in Kent and Sussex Counties.

Q. Well, isn't it a fact that in New Castle County
505 there is county zoning? A. There is county zoning in New Castle County.

Q. And is it your point that Kent and Sussex were opposed to New Castle's rezoning itself? A. No, they are opposed to Kent County and Sussex County being zoned.

Q. Is it your point then that New Castle County has been for zoning down in Kent and Sussex Counties? A. My point is that the people, or the representatives of Kent and Sussex Counties have been opposed to zoning in their counties for themselves, for the extension of zoning that you have in New Castle County to those counties.

Q. Well, has New Castle County tried to force zoning on Sussex County? A. No, it hasn't but exponents of zoning have urged that it be extended into those counties.

Q. But that would be on a county basis, would it not? A. Yes, it is on a county basis.

Q. And so far as you know New Castle has not tried to tell Kent or Sussex they have got to rezone, have they? A. No, they have not.

Q. What are some other instances which in your mind show a direct opposition of the northern part of the State to matters of interest to the middle or lower county? A. The right to work bill.

506 Q. Now, what has been the position of New Castle on the right to work bill? A. They have opposed the right to work bill—at least some portions of New Castle have.

Q. And what has been the position or pattern that you have observed with regard to Kent and Sussex on this right to work bill? A. They have advocated it.

Q. Has this ever come to a vote? A. I do not recollect.

Q. Well, as a matter of fact, hasn't the right to work bill been bottled up in a committee every time it has been introduced? A. I believe you are correct.

Q. It has never come on the floor, has it? A. I don't think so.

Q. So when you spoke of patterns of voting, you must have been wrong about a pattern of voting with regard to the right to work bill, which has never come out of a committee? A. The sentiment for the vote was there.

Q. But it has never been voted on? A. Actually that one has not.

Q. What are some of the other matters that you think that New Castle and Sussex are in direct opposition

507 over? A. Some of the game and fish laws or bills.

Q. Some of them? Not all of them but some of them? A. Some of them.

Q. Well, let's get to the big one. The big one is a constitutional convention. Now, there has been a direct opposition on that matter, hasn't there? A. Not actually on voting there hasn't, but there is sentiment in opposition.

Q. Well, then, forget about your patterns of voting that

you spoke of before. Let's talk now about your observation of sentiment. A. All right.

Q. From what you have observed since 1931 to the present time what is the attitude of Kent and Sussex Counties about a constitutional convention being convened? A. The attitude of Kent and Sussex Counties is in opposition to it.

Q. And what has been the pattern of thinking in New Castle County with regard to the calling of a constitutional convention? A. The attitude in New Castle County is that there should be a constitutional convention.

* * * * * * * * * * *

508 REDIRECT EXAMINATION

BY MR. HUGHES:

Q. Mr. de Valinger, you were questioned about the grievances or reasons that led to the separation of the three lower counties from the province of Pennsylvania? A. Yes.

Q. What were those grievances? A. Well, there were differences between the peoples themselves. The inhabitants of Pennsylvania were of English birth whereas those from the lower counties were of Swedish and Dutch as well as English. There were religious differences. The people of the province of Pennsylvania were Quakers whereas those of the lower counties were Calvinists, Lutherans and Episcopalians.

There had been considerable commercial rivalry between the port of Philadelphia and the port of New Castle.

Chester County of the province of Pennsylvania and New Castle County had disagreed about their respective boundaries. There were disputes of elections because of these disagreements.

509 Then also there was political jealousy that developed, sectionalism, between these peoples of the lower counties and of the province of Pennsylvania.

Q. So that I gather that there were quite a few different things. Can you single any one as the most important?

A. Probably the most important was the fact that writs of election were frequently delayed for the representatives of the lower counties, and they didn't get their representatives in the General Assembly soon enough, or they absented themselves, or they would also find that upon attending the General Assembly in Philadelphia that the business before the General Assembly pertaining to the Pennsylvania counties would be enacted upon and the Delaware representatives would sit there weeks and months waiting to be heard or to have their business transacted while their fields were unplowed or work at home was being neglected or crops were not being harvested—things of that type.

Q. I don't hear in any of that the fear of additional representation to be granted to Philadelphia because of its growing population. Was that a factor? A. The only way in which it was a factor was in the Charter of Privileges of 1701 there was a permissive clause that if there was a separation, the counties of Pennsylvania could expand their representation.

510 Q. Then do I take it from that that if the people of Philadelphia wanted additional representation they had to obtain it by or after a separation of the three lower counties? A. After the separation. The separation is credited to the Delaware counties rather than the Pennsylvania counties.

Judge Biggs: I do not follow that. I think we better go into it a little more.

By Judge Biggs:

Q. Certainly if this was included in the articles of separation, Mr. de Valinger, there must have been some cause for it. What was the cause so far as your recollection or knowledge of history shows? A. The cause was largely the dissatisfaction of the representatives from the Delaware counties the way their business was being neglected when they took it to the General Assembly at Philadelphia.

Q. I do not want to get cause before effect or treat

effect as cause. The separation was effected. Who wanted the separation? A. The Delaware counties wanted it.

Q. Pennsylvania did not want the separation—pardon me—the upper counties did not want the separation? A. No, I will say that their interest in that is minor
511 because Penn wanted so badly to keep them united, and his Council with him wanted to keep them united, but the Delaware counties did persist in their desire to be separated because of the unsatisfactory—

Q. Well, what I understood you to say was, the representation could not be increased, or at least was not increased, so long as the three lower counties remained in the set-up? A. Yes, sir, that is correct.

Q. Was this, so to speak, bait for the release of the lower counties which some ingenious member inserted in the provision? How did it get there? A. It got there because Penn had been so harassed by the threats to have their separate Assembly, by the threats of the three lower counties to appeal to the Crown to become a colony, that in this Charter of Privileges of 1701 this clause was inserted.

Q. Namely what? A. That in the event of a separation and the formation of a separate Assembly for the three lower counties that Pennsylvania counties could expand their own representation.

Q. Isn't that a very odd thing to put in what was a bill of rights for three counties would then become dis-
512 connected with the group? A. Yes, it was odd.

Q. You think this was simply because Penn desired to be relieved of harassment and retain some control, and took a compromise method whereby these Governors and he kept some control? A. Yes. He was trying very much to get affairs of the proprietary government in shape before he returned to England. He had to return to England.

Q. Why would the lower counties have been affected; why would they care at all whether or not the upper coun-

ties increased representation in the Assembly if they had their own? A. I question that they did care. There is no indication that I have seen—

Q. This was put in anyhow? A. This was.

Q. That is a rather mysterious situation, is it not? A. Yes.

Q. There is nothing in your research that has led to any cogent reason as to why this mysterious event occurred? A. No. There may be some correspondence with Logan that would disclose that, but I haven't seen any.

Q. Logan was the Deputy Governor? A. He was the secretary of William Penn.

513 JUDGE BIGGS: Pardon me, Mr. Hughes.

BY MR. HUGHES:

Q. Logan was William Penn's secretary? A. William Penn's secretary.

Q. The Governor at that time was Governor Evans?

JUDGE BIGGS: Who was the Governor, the Deputy Governor?

MR. HUGHES: The Deputy Governor. Excuse me.

THE WITNESS: There was Evans and Fletcher both about the same time.

JUDGE BIGGS: Evans and Fletcher?

THE WITNESS: Yes.

JUDGE BIGGS: Thank you.

BY MR. HUGHES:

Q. At any rate, that part of the thing, as I can see it, it seems to me it would not have been a threat of—

JUDGE LAYTON: Is this a question?

MR. HUGHES: Yes. Excuse me. I am leading the witness, I realize. Please withdraw it.

BY MR. HUGHES:

Q. That, then, is all you can explain about the reasons for the separation of the three lower counties. Is that

correct? A. As far as the history of our State is
514 concerned it is. It is not a major issue. Most of the time little notice is taken of it.

Q. What is not a major issue? A. The fact that the Pennsylvania counties would get increased representation.

Q. Under the Constitutions of 1776, 1792, and 1831, I think you testified that elections of representatives to the General Assembly were at large. A. Yes.

Q. Then you added by counties, or something to that effect. A. Yes.

Q. How were the elections conducted under the Constitution of 1776? A. The qualifications for election were spelled out in laws that had carried over from the colonial period, and writs of elections were issued by the sheriff, and the voters entitled to vote went to the places of election and voted.

Q. In other words, I think it was freeholders at that time, was it? A. Freeholders. That is right.

Q. Where would they go to hold the election? A. The county seats were always places of election.

Q. Then the qualified voters in New Castle County
515 would have gone at that time to New Castle? A. To New Castle.

Q. And those of Kent County? A. Would have gone to Dover.

Q. And those of Sussex County? A. Lewes, up until 1795.

Q. I did not hear that answer, I am sorry. Lewes up to when? A. Up to 1795.

Q. Yes. When they attended the election at the county seat they elected, then, all the representatives or members of the General Assembly from that county at large? A. Yes, they did.

Q. Which was the first Constitution to provide for election of Representatives and Senators from districts within the county? A. The Constitution of 1897, our present one.

521 Thursday, January 24, 1963,
2 o'clock p. m.

PRESENT:

As before noted.

MR. O'DONNELL: With the Court's permission we would like to call Mr. Houston Wilson.

JUDGE BIGGS: May the Court say it greatly appreciates the courtesy of counsel in going forward at this time.

Houston Wilson,

called as a witness on behalf of the defendants, having been duly sworn, testified as follows:

JUDGE BIGGS: Mr. Wilson, it is a great pleasure having you here today.

DIRECT EXAMINATION

BY MR. O'DONNELL:

Q. Mr. Wilson, notwithstanding the fact that you are personally known to the Court, for the record I would like to get certain background information. Would you please tell us what your education was? A. I have an A.B. from Swarthmore College and a law degree from Yale Law School.

Q. Do you practice law? A. I have been practicing
522 law in Sussex County since 1935.

Q. Have you taken part in political activities in Sussex County? A. Yes, I have.

Q. What has your participation been? A. I am a Democrat. I have not been especially active since the early 1950's. Mainly I have done some stump speaking for the Democratic Party. Prior to that I was more active, served on the State Committee, ran as an unsuccessful candidate for Attorney General, and served on the County Committee. I think I am now a member of the State Committee.

Q. Have you served in the legislature in this State? A. In the 1951 session of the General Assembly I was attorney for the Senate or one of two attorneys for the Senate.

Q. Where do you reside, Mr. Wilson? A. I now reside at Georgetown, Delaware.

Q. Will you please recall last summer and tell the Court what happened with respect to apportionment in the State with particular reference to action taken by the Governor of the State?

. . . . . .

526 A. The Governor convened what we call or characterize as a Governor's Committee. As a result of the first session of that committee a Bipartisan Reapportionment Committee was formed.

That Bipartisan Reapportionment Committee was formed in the following manner: The chairman of the State Committee of the Democratic Party appointed four members. The chairman of the State Committee of the Republican Party appointed four members of the Bipartisan Reapportionment Committee. That Reapportionment Committee was charged with the responsibility of endeavoring to formulate a plan of reapportionment for the State General Assembly and, two, to consider the feasibility and advisability of convening a constitutional convention of the State of Delaware.

By Mr. O'Donnell:

Q. Were you a member of either of those committees, Mr. Wilson? A. I was not a member of the parent committee, which we would call the Governor's Committee. I was appointed by the Democratic State Chairman as a member of the Bipartisan Reapportionment Committee, and subsequently I was selected as the chairman of
527 that committee and made my report, together with the other members of the committee, to the Governor's Committee at its second session.

MR. THEISEN: Now, may I move to strike all of the testimony of Mr. Wilson relating to anything that had to do with the Governor of this State prior to the time that he was appointed to this committee. It obviously had to be hearsay evidence insofar as this witness is concerned.

JUDGE WRIGHT: Mr. Theisen, we don't want to—at least I know I don't feel we should stick to the strict rules with respect to evidence; but even if we were, would this not be background testimony which would not be a question of hearsay, just background? There is nothing here yet that is any more than—I feel—is background leading up to what—

JUDGE LAYTON: You are not prejudiced at this point, Mr. Theisen, are you? Let us assume this is irrelevant, you are not prejudiced by this.

MR. THEISEN: All right. Let me make my position clear with the bench. I will probably be objecting more this afternoon than I have at any other time during the trial. I have strong feelings about the testimony that is about to be produced today as nothing having one thing to do with the issue before the Court.

I want to preserve my right for the record, if it becomes material, that I have not sat idly by and let this
528 testimony come in, and for that purpose I trust that you will indulge me in my constant repetition.

JUDGE BIGGS: The objection is overruled. Just a moment, please, Mr. O'Donnell. (Pause)

All right. You may proceed.

BY MR. O'DONNELL:

Q. I had asked you, Mr. Wilson, if you were a member of either of the committees you have just referred to? A. Yes. As I explained before, I was appointed by the Democratic State Chairman as one of the four Democratic members of this Bipartisan Reapportionment Committee, and at its first session I was selected as the chairman of that committee.

Q. Will you please tell the Court what the committee did with respect to this issue? A. Chronologically, for myself, between the time that I received notice of my appointment and the first meeting of the committee I endeavored to prepare myself as best I could within a short period of time as to the issues and problems which would confront the committee.

The committee first convened at the Administrative Building of the Delaware Memorial Bridge on Thursday evening, July 12, 1962. We had a full open session at that particular meeting. We organized at that meeting.
529 I was selected as chairman and Mr. Harold Schmittinger, another member of the committee, was selected as secretary. The committee recessed at the end of that evening's session and again convened on July 17, 1962, at the Treadway Inn in Dover, Delaware, where we had, I believe, two full sessions, two full open formal sessions. We then convened again July 21, 1962, an afternoon session, at the Treadway Inn at Dover.

As I recall, that lasted into the evening, also.

Following that I undertook to prepare the formal report of the committee. Mr. Schmittinger and Mr. Hartnett undertook to prepare a portion of the legislation which we were to recommend as part of our report.

I requested Judge Herrmann, of the Bar here in Wilmington, to assist us in the preparation of some of the legislation pertinent to the report, and we then met in another formal session at the Governor's offices in Dover, I believe on the 23rd day of July, reviewed the report, reviewed the legislation, and then went into the main offices of the Governor and presented our report together with the attendant copies of the legislation to the parent committee, or the Governor's Committee itself, which had been convened awaiting our report at that time.

. . . . . .

531 Q. Would you describe the membership?

MR. THEISEN: If your Honor please, of course I object.

JUDGE BIGGS: I understand that. Your objection goes to the entire line here. We so understand. It goes to this entire line of questioning.

A. Four members of the committee were members of the Republican Party, one of which was from the City of Wilmington, one from the County of New Castle, one from the County of Kent, and one from the County of Sussex. Four were members of the Democratic Party, likewise one each from the City of Wilmington, New Castle County, Kent, and Sussex.

Their names were Mr. Harold Schmittinger of Dover. Mr. Schmittinger is a Republican attorney. I believe that he holds a degree from a university and from a law school and is actively engaged in the practice of law. He has been active in politics and civic affairs for a considerable number of years.

Mr. Maurice A. Hartnett, III, of Dover. Hartnett is a Democrat, also a member of the Bar and actively engaged in the practice of law for a number of years and holds a university and law school degree, and has been active in Democratic politics. He was then and I believe he

532 still is head of the Legislative Reference Bureau of the State of Delaware. I think he also has served as an attorney to the General Assembly for a number of sessions. He also has business interests in Dover and throughout the State.

Next is Mr. Thomas L. Johnson of Rehoboth Beach. Mr. Johnson is an industrialist, an active member of the Republican Party, and he has served as a Senator from the Senatorial District including Rehoboth in Sussex County, and he has also served as Chairman of the County Committee of the Republican Party. He is very active in many civic affairs and in many business interests and serves on boards of directors.

Next is Mr. Gerald P. Cavanaugh. Mr. Cavanaugh, I believe, has been for a number of years one of the house counsel for the Hercules Powder Company. He is a Republican and active in the Republican organization of the City of Wilmington for a considerable number of years. He was once Republican candidate for Mayor of the City of Wilmington. He has been active in many civic and other organizational affairs.

Next, is Mr. Frank O'Donnell, who is yourself, a member of the Bar, former Chief Deputy Attorney General, and Secretary for many years and Chairman of the New Castle County Democratic Committee, and I understand that you have many active interests in many civic organiza-
533 tions and in many church affairs. You hold a university and a law school degree.

Next is Mr. Ernest S. Wilson, Sr., retired chief engineer of the Hercules Powder Company. Mr. Wilson has served on a great many of the various governmental agencies of this State, been a leader of the Republican Party for a great many years, and active in many civic organizations.

Next is Mr. Michael A. Poppitti, who is now and was then the City Chairman of the Democratic Party City Committee. At one time he was candidate for Attorney General. He is a lawyer and has a college degree and a law school degree. He is very active in many civic and church affairs.

I think I have covered them all except possibly myself. I mentioned what degrees I hold, how long I have been practicing law, and my party affiliations. I have lived in Sussex County all my life. I have wide acquaintances throughout the State. Perhaps I can class myself as a very rank amateur historian, one of my hobbies, and I am active in church affairs both on the local and diocese and national level, and have indulged in quite a number of civic affairs with various civic organizations.

Q. Mr. Wilson, in addition to the meetings which you described a few minutes ago, were public meetings held

in New Castle, Kent and Sussex County by members of the committee?

JUDGE BIGGS: You mean meetings to which the
534 public were invited?

MR. O'DONNELL: Yes, sir.

A. In Sussex County between the meeting of July 12 and July 17 Mr. Johnson and I—by the way, I should back up and say that this committee was composed of two from Wilmington, New Castle County, Sussex County and Kent County—that is, two each. Senator Johnson and I were from Sussex County. We convened a meeting at the Sussex County Courthouse to which we invited all of the members of the General Assembly, both the Senate and the House of Representatives, certain members of the local Bar of Sussex County, aside from myself, from both political parties to attend, and we gave them a full explanation and a full report of the functions, duties, responsibilities and efforts that we were then making toward arrival at a plan of reapportionment, gave them a full report as to the discussions pro and con with regard to the calling of a constitutional convention. We invited questions, and we asked for their comments.

We made our report to the Bipartisan Committee as a result of that meeting, and the members from Kent County did likewise. They indicated that they had held similar meetings with members of the General Assembly from that county.

Also I believe that you made a report and Mr. Poppitti made a report that you had held similar meetings
535 and also that you had held public meetings to which the public was invited.

Q. Now, in addition to the formal meetings that you have described, did the committee meet informally for luncheons, dinners and other informal meetings to discuss this problem? A. Well, Mr. O'Donnell, some of us would arrive early before the meetings went into formal session. There would be constant discussion—

JUDGE BIGGS: Mr. O'Donnell, this seems to be de minimus on this issue. What if the committee did have informal meetings? We are interested in what the committee did.

MR. O'DONNELL: Yes, sir.

BY MR. O'DONNELL:

Q. Mr. Wilson, would you tell us what the committee did?

JUDGE BIGGS: Before we get to that point, let's see how the committee did it.

BY JUDGE BIGGS:

Q. Were minutes kept of your meetings? A. Your Honor, at the first meeting—all of our formal meetings were. They were open to the members of the public, press, representatives from radio stations, they were attendants at such, and while we may not have had space enough if there was a mass of the general public who wanted
536 to come to these meetings, to the extent that we had space or room enough they were welcome.

Q. Were there minutes kept? A. At the first session one of the members from the radio station had a tape recorder. We secured that tape and had it transcribed by a Court Reporter. At the other sessions we had a Court Reporter at all times present.

Q. Has there been a transcription made? A. Yes, sir.

Q. Where is that transcription? A. I secured it from the Governor's office. We returned it to the parent committee when we made our report. I have it here.

JUDGE BIGGS: It would seem to me that the very best evidence of what transpired is this record which the chairman of this committee has here today. I assume there will be no objection to it except the usual one that Mr. Theisen has going to this whole line of testimony on the grounds of relevancy, but certainly this would be the best evidence of what did transpire before the committee. Why do you not offer it?

MR. O'DONNELL: I intended to offer it, your Honor. I

wanted to briefly refer to the meetings, luncheons, dinners, that were not on the record, get the high points of
537 the discussion, and then I intended to offer the minutes.

JUDGE BIGGS: Well, of course, how can this witness testify there except by hearsay?

MR. O'DONNELL: He was present, your Honor.

JUDGE BIGGS: Yes, but it is hearsay nonetheless.

MR. O'DONNELL: I would disagree with your Honor.

JUDGE BIGGS: Suppose he reports what X said to him, is that not hearsay? Or would you have him give only his side of the conversation?

MR. BOVE: There are exceptions to the hearsay rule.

JUDGE BIGGS: How do you bring this into the exception?

MR. BOVE: One of the exceptions is contemporaneous and spontaneous statements of the participants in a matter.

JUDGE BIGGS: Over how long a period were these meetings?

MR. O'DONNELL: Several weeks, your Honor.

MR. BOVE: They were several weeks.

JUDGE BIGGS: Do you think that would come within the rule of contemporaneous? Probably you mean really the rule of res gestae.

MR. BOVE: Yes. Sometimes the rule is described as the rule of res gestae, sometimes the other way.
538 Another exception to the hearsay rule is the exception of operative words, and depending upon the witness' answer to the question, some of what he had to say might be within the operative word exception to the hearsay rule.

JUDGE BIGGS: The exception to the operative word rule is exceptionally operatively difficult to apply in a courtroom. Some courts do not make any use of it at all. What is the Delaware rule in respect to it?

MR. BOVE: I think operative words are admissible in Delaware, sir. I do not have any authority off the top of my head.

JUDGE BIGGS: Of course, the rule of the Federal Court, which is the most liberal, would be employed. We know that.

MR. BOVE: Yes.

JUDGE BIGGS: I have great hesitancy in getting into conversations with only one party to the conversation present. I am sure that Mr. Wilson's memory is as accurate as that of most lawyers, and is probably more accurate than anything I could possibly develop under the circumstances.

It seems to me to be somewhat difficult to bring this into a well-recognized exception to the hearsay rule on the grounds of res gestae.

Do you want to be heard on this?

539 MR. THEISEN: I would think the rule of res gestae is perfectly clear, your Honor; it has got to be a statement made contemporaneously with the act; it has got to be the utterance of the second. It does not extend beyond that. It has got to be very, very closely associated with the act.

The reason it is admitted as an exception is because of the spontaneity of the words that are used in conjunction with the act.

JUDGE BIGGS: What is the act here, would you say?

MR. THEISEN: A very casual conversation. I do not think it has any application at all.

MR. O'DONNELL: Your Honor, I feel this matter is not within the hearsay rule so we did not have to turn to any exception to it. The reason it is not is because you may have a verbal occurrence or you may have a physical occurrence.

John may testify that he saw Mary pick the book up. John may also testify that he heard Mary say, "Ouch."

That is all we are asking Mr. Wilson to do. He cannot testify that Mary told him when the book fell on her foot she said, "Ouch," but he can testify as to what he saw and heard. He can testify, "I saw the cannon go

off, and I heard the noise from it." That is not within the hearsay rule.

The hearsay rule is where you are testifying as to information you have received from a third person.

540 When you are testifying with respect to information that you saw, or heard, or felt yourself you are not testifying with respect to any testimony that is within the hearsay rule.

Mr. Wilson was present when these things transpired. He saw certain things happen. He may have felt certain things happen. He heard certain things. We are only asking him about those things that he heard himself, and those things that he did himself.

JUDGE BIGGS: You have not yet disclosed the purpose for which you are offering this.

MR. O'DONNELL: I am offering this testimony to help in the development of the legislative intent, to show you the legislative history of the subject that is before you, the constitutionality of House Bill 574; as subsequently adopted as House Bill 3.

JUDGE BIGGS: It is your view the oral and informal meetings of which no record was kept are the equivalent of what might be termed legislative history of the way that is provided, for example, in respect to acts of Congress, where you have committee reports, or, on very rare occasions, speeches from the floor of the—

MR. O'DONNELL: Exactly. When you have the record of the testimony of witnesses before the various committees in analyzing legislative history the courts examine

541 the history of the hearings on the bill before the various committees, "Mr. Jones spoke." They have a stenographic transcript of what he said.

JUDGE BIGGS: They do not have before the House or the Senate, either, the, so to speak, executive sessions of the committee. It is true you have the testimony of witnesses before the committee and the sub-committee, usually the sub-committee. They are part of the—

frequently part of the legislative history, but what you are asking here are deliberations.

Now, this is pretty far removed physically, at least, and I think also what you might term mentally, from the actual deliberations of the legislature itself whereby it enacted the proposal which was embodied in House Bill 574, and I assume accepted the proposal in HB 3.

I think we are allowing a great deal of latitude, a great deal of latitude, in permitting the transcripts. I am not at all certain that we should permit these, and we are taking them subject to a motion to strike.

But oral conversations informally between members of the committee seem to me to be too far removed from the scene of the action of the legislature to be admissible.

MR. O'DONNELL: Your Honor, I would—

JUDGE BIGGS: Just a second, please. (Pause)

542 We have stated our view. I have stated my view here. Now, you have a question pending. What is it, please? Will you restate it?

MR. O'DONNELL: I will endeavor to.

JUDGE BIGGS: Do your best.

BY MR. O'DONNELL:

Q. I believe that I had just asked you, Mr. Wilson, if you would tell us what you heard, and what you did at the informal meetings of the Governor's sub-committee.

MR. THEISEN: I object, your Honor.

JUDGE BIGGS: Just a moment. That is exactly the point at which I thought we were.

MR. THEISEN: Yes.

JUDGE BIGGS: The Court is divided on this issue. I think it would be desirable, from the Court's point of view, since one of us at least is of the view that it should be admitted, to admit it subject to the same ruling, and we will therefore permit the question.

Judge Layton desires to have it appear on the record that he votes against the admission of the question, and,

of course, the answer thereto, I assume, if it is responsive. Let the record so show.

THE WITNESS: Your Honors, since we do not have the Reporter here, my recollection was that I was in the
543 midst of explaining with some detail what informal discussions took place.

JUDGE BIGGS: What we would like to have is, if you are going to be permitted to testify on this point, Mr. Wilson, is the substance of what you said. Go ahead and develop it in your own way.

We must get through here on this issue this afternoon, if possible; if necessary we will go over on this, but time is going along.

THE WITNESS: Let me just explain that before the formal sessions, during recesses and during meals, there would be informal discussions among the members of the committee.

At the first session of July 12, 1962, the tape ran out on the tape recorder so that the transcription of that is not complete towards the end of the session.

Let me also explain that at the meeting preliminary to making our report to the parent committee on July 23, 1962, there were no minutes kept of that. There were no minutes kept of our verbal report or explanation to the parent committee at the Governor's office on that occasion.

Following that when the legislature was convened, members of the committee were called into the various caucuses of the parties to explain to them in some detail the meaning of this report, the discussions that had taken place.

544 We also appeared before the Houses of the legislature. I am speaking of the last session of the legislature.

So that the work of the committee was not completed, or at least my work as chairman was not completed until the last session of the legislature gave its final consideration to this report and the legislation which accompanied it.

BY MR. O'DONNELL:

Q. What, if anything, did the Governor's whole committee do with respect to the report? A. The Governor's Committee accepted the report and approved it. It was the consensus there that all those who were members of the Governor's Committee would urge its adoption and enactment by the General Assembly.

The Governor's parent committee was composed of the political leaders of the two major political parties at the State level, at the County level, and also the leaders of the two parties in the General Assembly, in both Houses of the General Assembly.

Q. Mr. Wilson, in the deliberations of the committee was the so-called Federal plan discussed? A. It was.

545 Q. Mr. Wilson, referring only to non-recorded meetings, will you please tell the Court what transpired, and what issues were discussed?

JUDGE BIGGS: First what issues were discussed at the non-recorded meetings, put it in that form.

BY MR. O'DONNELL:

Q. Please tell the Court what issues were discussed at non-recorded meetings. A. Your Honors, this is going to be rather difficult for me to weed the chaff from the grain here for this reason, I received a call yesterday that I would be asked to come here and testify tomorrow. I was occupied with other things, but I did manage to go to Dover and pick up the original transcripts and the original
546 report from the Governor's office, with the thought in mind that I would devote today to preparing myself more fully, and to refresh myself upon what transpired last summer. Then last night I received another telephone call saying that the Court would like to have me—

JUDGE BIGGS: Very well. The substance of what you are saying, Mr. Wilson, is you cannot answer the question in that form. You may rephrase it.

BY MR. O'DONNELL:

Q. Will you tell the Court what issues were discussed by the committee?

JUDGE BIGGS: We understand, Mr. Theisen, your objection goes to this full line.

THE WITNESS: We first started our discussions with respect to asking each member—This is the plan that I formulated for the deliberations of the committee—to ask each member what their conception was as far as our problem was concerned; what we were there for.

After each member of the committee had given his version of it we came to a conclusion as to the purposes for which our Bipartisan Committee was formed. We determined there were two purposes; one was to formulate a plan of reapportionment which we felt would meet the test of such guide lines as there were in the Supreme Court decision of Baker versus Carr, and at the same time
547 the plan would, from a practical point of view, have a reasonable expectation of being enacted by the General Assembly.

We conceived it was our responsibility as a bipartisan political—and from a territorial point of view—to try to make a plan which would have our unanimous endorsement.

The second part was for us to consider whether or not the State of Delaware should have a constitutional convention to deal with the problem of reapportionment, and when that constitutional convention should be convened.

JUDGE BIGGS: I see no reason for including any further testimony about the issue of the constitutional convention, Mr. O'Donnell, do you?

MR. O'DONNELL: No, I do not.

JUDGE BIGGS: Very well, then, I will ask Mr. Wilson if you will be good enough to exclude that, exclude that issue from the testimony hereafter.

THE WITNESS: I shall be very happy to.

MR. THEISEN: Your Honors, I trust that in this ruling or request that you are not thereby precluding me from cross-examining the witness on the package deal that was made.

JUDGE BIGGS: We will rule on your questions as they come up, Mr. Theisen.

Do you object to the Court's ruling on this?

MR. THEISEN: Well, sir, I expect to go into the
548 question of the constitutional convention.

JUDGE BIGGS: I am asking you one question. Do you object to the Court's ruling on this?

MR. THEISEN: Only if the Court thereby is precluding me—

JUDGE BIGGS: Not any "onlys" or "ifs". The Court has made a ruling. Do you object to it?

MR. THEISEN: Yes.

JUDGE BIGGS: Very well. Note the objection. The objection is overruled.

MR. THEISEN: Thank you.

JUDGE BIGGS: You are now free to conduct yourself according to the rules of evidence.

THE WITNESS: We then started to develop the plan of reapportionment on a step-by-step basis. Let me explain that very briefly.

If we first started with the geographical composition of the Senate that we contemplated, and this was open for discussion, and the method that I used as chairman was, first of all, to call upon each member of the committee, including myself, to give a preliminary discussion as to how he thought this particular proposition should be solved, and went completely around the table.

JUDGE BIGGS: Mr. O'Donnell, I do not doubt that
549 this committee proceeded with its duties conscientiously. I would like to get to the point, if we are going to reach that point of the substance of what he is doing.

By Mr. O'Donnell:

Q. Mr. Wilson, will you address yourself specifically to the issues? A. Yes. The first thing we considered was the formation of the Senate, and in that we ultimately arrived at the conclusion that we should adopt the so-called Federal system as far as the upper House was concerned, and that is to say that the historic three counties of Delaware would each have equal representation in the Senate, and that each of those counties would have seven members of the Senate.

We then entered into a discussion as to the formation of the House. There we endeavored to come up with a plan which we felt would give due consideration to a House upon a population basis as distinct from the Senate on a geographical basis.

We took this step by step.

As far as the House was concerned we first resolved that each of the existing representative districts of the State should be preserved, and that each of those representative districts should have at least one Representative in the House. This was in keeping with the Federal system where even the smallest state, population-wise, has at least one Representative in the House of Representatives.

We then discussed what would be the population factors by which a given existing historic representative district would be entitled to additional representation in the House. We came up with the factor that for each additional 15,000 in population over the first 15,000, or for an additional major fraction of each additional 15,000, that particular representative district would be entitled to an additional Representative.

This would mean that when a particular representative district reached 22,501 in population that thereupon it would be entitled to two representative districts, which would mean that the populaton factor would be in the neighborhood of eleven or twelve thousand. This would

continue until it reached 37,500 and then each district would be entitled to a third, and this would mean a population factor of about somewheres around 12,000, and so on, as each additional 15,000 or major fraction thereof was added to the population of that particular district.

We then turned to the question of how these additional Representatives would be elected from a given representative district, and there again we undertook to follow the Federal system by drawing the analogy between the existing representative districts and the existing states of the Federal Union, which is to say that at the end of each census that given representative district if it were entitled to, say, a total of three, would be resubdivided into three representative districts, and from each of those subdivided representative districts there would be elected one Representative to the General Assembly until the next decennial census when the same system would be gone through again.

551

JUDGE BIGGS: At this point let us get into the record, subject to Mr. Theisen's objection, of course, the fact that the recommendations of this committee were accepted, as I remember it, in toto and that the report of this committee became a draft bill.

BY JUDGE BIGGS:

Q. I believe you drafted a bill, did you not? A. Yes, sir.

MR. O'DONNELL: It was appended to the report.

JUDGE BIGGS: The appendix to the report was H.B. 574 and also H.B. 3; is that correct?

MR. O'DONNELL: That is my understanding, sir.

JUDGE BIGGS: I am leaving out of this at the present time the rest of the report which related to the proposed calling of the Constitutional Convention. We may have to deal with that later.

552 BY JUDGE LAYTON:

Q. Do the minutes which have been transcribed reflect what you have testified to for the past five minutes or so? A. I believe they do substantially.

JUDGE LAYTON: Very well.

BY MR. O'DONNELL:

Q. Mr. Wilson, where did the suggestion of using the Federal analogy come from?

JUDGE BIGGS: Why is that important?

MR. THEISEN: I object.

MR. O'DONNELL: We feel it is important, your Honor, to show that a member from the most populous area of the State has suggested this plan.

JUDGE BIGGS: That in my opinion is too far afield.

Do you agree on this, Judge Layton and Judge Wright?

JUDGE LAYTON: Yes.

JUDGE WRIGHT: Yes.

JUDGE BIGGS: Let the question be stricken out.

MR. O'DONNELL: Would you indulge me a moment, please, to consult with counsel?

JUDGE BIGGS: Certainly.

MR. O'DONNELL: Your Honor, we believe it is important particularly with respect to a question of relief for this Court to hear this witness' analysis of the Court's

553 plan as included in your tentative suggested plan, and we would like to ask him some questions predicated upon the plaintiffs' plan. I am explaining this in advance so Mr. Theisen will have an opportunity to object.

JUDGE BIGGS: You say you think it is important to have this witness testify as to what, the feasibility of the Court's plan?

MR. O'DONNELL: Yes, sir.

JUDGE BIGGS: And also the feasibility of the plaintiffs' plan?

MR. O'DONNELL: That is right.

JUDGE BIGGS: In what respect?

MR. O'DONNELL: In all respects, your Honor.

JUDGE BIGGS: Well, does he qualify as an expert in respect to this?

MR. O'DONNELL: We feel that based upon his study and his experience in politics in Delaware and in particular his study on this committee he is qualified, sir, to so testify.

JUDGE BIGGS: Do you concede or do you not concede that his qualifications would have to be those of an expert?

MR. O'DONNELL: Yes, sir, I would concede that.

JUDGE BIGGS: Do you all concede that on this side?

MR. TERRY: No, I do not concede that.

554 JUDGE BIGGS: You think that any citizen may testify as to that?

MR. TERRY: Yes.

JUDGE BIGGS: What is your position, Mr. Bove?

MR. BOVE: I don't think that he has to be an expert perhaps in the sense of the word that your Honor is using it. I do think that based upon his experience and his dealing with various people throughout the State for the number of years that he has testified when we went through his qualifications that he is expert enough for the purpose of answering questions on these two plans. I think that is particularly material with respect to what, if any relief the Court will afford the plaintiffs in this litigation.

JUDGE BIGGS: Mr. Hughes, what is your position?

MR. HUGHES: My position, your Honor, is that this is not the kind of opinion evidence that requires qualification as an expert for the witness to give. I think it is the kind of thing that a citizen interested in political matters is qualified to express his views on.

JUDGE BIGGS: Do you plan to introduce any other testimony than this one witness on this subject?

MR. HUGHES: We do not plan to.

JUDGE BIGGS: Gentlemen, despite the provisions of the pre-trial order we have let you go into this in this
555 respect with this witness, but I did not realize that he was going to testify as to this and no statement

was made in respect to this yesterday that I can recall, Mr. O'Donnell. Did you make any?

MR. O'DONNELL: No, sir.

JUDGE BIGGS: That he was to testify as an expert on what the effect of the plaintiffs' plan or of the very tentative project called the Court's plan would be.

MR. O'DONNELL: I didn't make any such statement and I didn't hear anybody else make any.

JUDGE BIGGS: No, I don't think any such statement was made.

MR. BOVE: None was made, sir.

MR. THEISEN: Your Honor, obviously I would object to any such testimony. My grounds are that the defendants' own witness, Professor Pollock, has been here as an expert. We have produced two experts. All the experts have agreed that there are certain factors that they as political scientists take into account when they evaluate any of these plans. Goodness knows, I have, I think, probably fifteen or twenty people who have been working on reapportionment in this State for ten years that I don't think I could put on the stand, but I would love to put them on if we are going to listen to testimony of this sort.

556 JUDGE BIGGS: The thing that disturbs me a great deal about that is this: Mr. Theisen's experts have departed the trial.

MR. THEISEN: Yes, sir.

JUDGE BIGGS: This is a situation which arises quite frequently in cases not involving this type of litigation, but, for example, in patent litigation where someone testifies in respect to the working of a chemical formula and an expert stands by and makes notes and hears the testimony and is there for the purpose of rebuttal.

MR. THEISEN: Precisely.

JUDGE BIGGS: Mr. Theisen's witnesses in this respect are not here. It seems to me that if we are to embark on the issue of a member of the Commission who prepared a plan to testify as to what he thinks would be the result of a

plan which has not been ordered by the Court or may never be ordered by the Court, even on that ground alone it is pretty tenuous. But quite aside from that, Mr. Wilson, despite his eminence in the community, is not a political scientist and he has no degree or standing as such. As for the effects it seems to me this is something which a political scientist would require prescience, as Mr. Pollock, your own witness, very candidly stated yesterday.

I think we had better consider this matter. We
557 are up to 3 o'clock and it is time for a recess. We will stand in recess for about ten minutes.

(At this point a brief recess was taken.)

JUDGE BIGGS: Gentlemen, we apologize for the delay. I think it must be apparent that the Court had a number of points which it had to discuss.

Mr. O'Donnell, how many witnesses do you plan to offer on this point?

MR. O'DONNELL: No other witnesses, sir, and I would like to withdraw the question, the last question which was asked.

JUDGE BIGGS: Very well, you may withdraw it.

MR. O'DONNELL: I wonder if I might advise the Court at this time that while Mr. Wilson was not listed as a witness, he has been called because I believe at the Court's suggestion it was announced that a witness would be called to explain the plaintiffs' plan to the Court. That was set up for tomorrow. We had not planned to call Mr. Wilson, but when we learned that a witness on behalf of the palintiffs would be called to explain the plaintiffs' plan, we thought it advisable to call a witness to assist the Court in explaining House Bill 574 to the Court, and that is why Mr. Wilson was called, even though he was not on the pre-trial order, as I understand, nor was the
558 other witness—and I am not objecting to the other witness being called to explain the plan to the Court. It is at the Court's request.

But that is the reason why we decided to call Mr. Wilson even though his name was not listed here.

JUDGE BIGGS: My recollection is not sufficiently accurate to recall precisely what has occurred in the last few days. I think everything of importance is on the record and can be verified in that respect. However, it seems to me that the explanation that you have made is at least satisfactory to me.

Now, let us see what the next question is.

BY MR. O'DONNELL:

Q. Mr. Wilson, would you tell the Court, please, why a unit of 15,000 was picked by the committee?

JUDGE BIGGS: Let me make one thing clear here. You really in this respect are calling Mr. Wilson as an expert—

MR. O'DONNELL: I did not intend to, your Honor. I intended to have him advise the Court why the committee picked it in their deliberations, not as a philosophical matter, as a political scientist.

JUDGE BIGGS: Is this as to 574?

MR. O'DONNELL: Yes.

JUDGE BIGGS: Why they picked the number?

559 MR. O'DONNELL: The number 15,000.

JUDGE BIGGS: Mr. Theisen?

MR. THEISEN: It is subject, I trust, to my former objection?

JUDGE BIGGS: Certainly, all of this line goes to your former objection.

BY MR. O'DONNELL:

Q. Will you answer that question if you can, Mr. Wilson?

A. There were a number of practical problems with which the committee necessarily had to deal. We considered 10,000, the so-called ideal of 12,750-odd, 15,000, 16,000, 20,000, as the population growth factor for Delaware. We finally concluded that 15,000, or a major portion thereof, was in our opinion the best factor to be applied to this State for a number of reasons.

The first reason was the question of, How large did you want your House of Representatives to be in the foreseeable future? With this major fraction thereof, as the population continued to increase there is a gradual slowing down in the ultimate divided factor, if you will follow my formula, or the formula which we adopted, in the sense that if you get to 22,500, divide that by two, you come up with 11,250. When you get to 37,500 and divide that
560 by three, you come up with 12,000. When you get to 52,500 and divide it by four, you come up again with a gradual slowing down in the over-all size of your House.

If you take a factor of less than 15,000, you run into a problem of housing, and you also run into a problem of what constitutes in a relatively small geographical state such as ours what constitutes a House which can give voice to all segments of our society and all the customs and practices that have grown up here in a rather ancient state so far as the history of the United States is concerned. This to us was of considerable importance, not to make your House too large and not to have a growth factor which would compound the size of the House too rapidly but at the same time, as far as the House of Representatives may be concerned, to have it, as we felt, rationally related to population growth.

Now, you can talk and the experts can talk all they want to about it, shall it be 7,500, shall it be 10,000, as far as the first Representative is concerned and as far as consolidating districts may be concerned, or subdividing districts, existing historic districts, may be concerned. But the point is this: We are told—and I think this is a matter of record that anyone can read in any number of pamphlets or journals of those who have studied it—that this world of ours, and particularly the United States, and with
561 great emphasis on the State of Delaware, is going through a rapid population climb. The truth of the matter is by the year 2000 the population of the world is

going to double itself. There is going to be more population produced in these few short years than has been produced from the time of Christ up until the present time. Now, this applies to Delaware. The prediction is that this entire State will become a part of an intense growth area extending all the way from Boston down as far as Washington.

The population growth factors and predictions for the State of Delaware are just overwhelming; so that even though now you may have a district which has, as I understand it, in New Castle County under our proposed plan represnting 1,600, and possibly one in Kent and Sussex Counties representing 2,600, the Committee felt, and I think this is true, that this is going to become moot in a matter of about ten years. I would hazard to predict within the next ten or twelve or fifteen years every one of these existing historic representative districts in this State is going to have at least 15,000 population. This is just where the chart is pointing. It is pointing right towards it; and so it is that all this discussion, we felt, as to whether or not you should now subdivide or whether you should now consolidate was going to become moot in a very short period of time, and the question was to predict—I mean not to predict but to pick a representative quotient of 15,000 or major fraction thereof, which would keep this thing in balance once every one of the representative districts reached or almost reached the initial point of 15,000, which we felt was going to be in a very short foreseeable time.

562

There were other things that would concern us, that is, the fact that except as during the period of the last Constitution, which is 1897, I believe, up until the present time this State either as a colony or a state had never concerned itself with the problem of apportioning its Representatives in the General Assembly in either House on a population basis. So it was that from the early part of the seventeen hundreds up until that time each of the counties

had an equal representation in both Houses of the General Assembly, and Delaware had come quite a long ways under this particular system.

True enough the Constitutional Convention which adopted our present Constitution did give some measure of the population factor to the make-up of the two Houses, and so it is that we felt that this should go forward one more step with regard to one of those Houses.

When you come to consolidating districts, or sub-
563 dividing districts, again we were a little bit fearful of what the so-called experts might do, that is to say, someone who sits down with a bunch of figures and a map, such as this, and then draws some lines on it, because we understood the Supreme Court to say and to recognize that each state should, in apportioning its legislature, be concerned with the interests, the customs, the habits, and the practice of its people.

Now, it is all very well to say, "We will take two representative districts in Sussex County and we will put them together and come up with 10,000," but is it going to work?

Mr. Theisen: If your Honors please, this testimony has been fraught with all kinds of estimates, all kinds of opinions of the witness, not relating, it seems to me, one whit to the question that is asked, and I certainly don't think he has been offered as an expert on population expansion, and if he had been I certainly would have objected, yet his testimony is full of it.

I should like at some point to register an objection.

Judge Biggs: You have registered your objection. Now, I think some of what Mr. Theisen says, even within the broad area we have allowed the witness, is somewhat
564 too broad. He stated his reasons.

Are there any other reasons?

By Mr. O'Donnell:

Q. Mr. Wilson, will you answer the Court's question, please? A. Yes.

Q. Judge Biggs asked are there any other reasons why 15,000 was picked as the unit of measurement? A. I think that I have covered the reasons.

MR. O'DONNELL: At this time, your Honors, I should like to offer, I believe, as Defendants' Exhibit 1 the volumes which have been marked "Sub-Committee Meetings."

JUDGE BIGGS: Why are they marked "Sub-Committee"?

MR. O'DONNELL: It was the sub-committee of the Governor's whole committee.

JUDGE BIGGS: I understand that. These are the meetings, however, that Mr. Wilson—of the sub-committee which Mr. Wilson was chairman of.

MR. O'DONNELL: That is so, your Honor.

JUDGE BIGGS: Thank you.

MR. O'DONNELL: Three volumes. Your Honors, I would like to offer these three as one exhibit. I think I had better take these markers out of here, if you will bear with me.

565 JUDGE WRIGHT: Maybe Mr. Wilson needs those markers. Let's leave those in there.

JUDGE BIGGS: Mr. Theisen unquestionably makes the same objection.

MR. THEISEN: Yes. I make that objection, plus the one that the witness supplied himself, namely, that they are not complete.

JUDGE BIGGS: Very well. We will receive them subject to a motion to strike.

THE CLERK: The documents are marked Defendants' Exhibit 1.

JUDGE BIGGS: Anything else?

MR. O'DONNELL: Excuse me. We rest.

JUDGE BIGGS: Just a moment, please, before they are marked. Just a moment. Apparently my brothers and I are not in complete accord.

Let the exhibit be marked and received subject to the Court's ruling, that is to say, subject to Mr. Theisen's objection and motion to strike.

(Thereupon three volumes of the sub-committee hearings were received in evidence and marked "Defendants' Exhibit No. 1.")

* * * * * * * * * * *

567 CROSS-EXAMINATION

BY MR. THEISEN:

Q. Mr. Wilson, when were you appointed to the Bipartisan Committee? A. I can say sometime prior to July 12, 1962, if that is sufficient. I can try to pinpoint it more definitely if you would like me to from my file.

Q. Is that the closest you can come to it now, sometime before July 12th? A. Give me a moment and I will see if I can hit the target closer for you.

Q. All right; fine. A. On July 5th I wrote Mr. Potter, "I see by the News Journal papers that my name will be presented to the Governor as a member of the Bipartisan Committee." So my first knowledge some through the News Journal papers about July 3rd or 5th.

Q. Would you mind answering my question, please, Mr. Wilson? When were you appointed to the committee?

A. That is the best answer I can give you, Mr.
568 Theisen. You will have to be content with it.

Q. Did you get a formal designation as a member of this committee? A. No, sir.

Q. Do you have any present recollection as to how you were appointed to this committee other than by noting it in the newspapers? A. Yes. The Chairman of the State Democratic Committee called me on the phone and asked me if I would serve.

Q. Was that after you had written your letter of July 5th? A. I have no recollection, sir.

Q. You don't know whether you wrote the letter first or received Mr. Potter's call or Mr. Conaway's call, rather, first? A. My best recollection would be that I received his call after I had read this in the News Journal papers.

Q. Whose call? A. Mr. Conaway's.

Q. After you had received, as you now think, a telephone call from Mr. Conaway and before you met on July 12th for the first organization meeting what did you do with regard to reapportionment if anything? A. Well, I wrote to Mr. Potter, because the same newspaper report
569 disclosed that he had discussed the action taken by the Federal District Court in Wisconsin with respect to reapportionment. He had apparently discussed this, according to the newspaper report, at the parent committee or the Governor's Committee meeting; so I asked him to furnish me with all the material he had on the Wisconsin case.

At that time I had a law clerk, and I immediately assigned him to the task of weeding out all reapportionment suits that could be found in the United States Law Week.

On the same day I wrote to the Bureau of National Affairs at Washington, D. C. and asked them for two additional copies of Volume 30 No. 27 of the Supreme Court's opinion in the United States Law Week; and, as I recall, I read somewheres near a thousand pages of court decisions, particularly including Baker versus Carr, which was 100 pages long, and tried to make some digest so that I could get a thoroughgoing understanding as far as I was able of the amount of discretion within which the committee could operate.

Q. When did you write this second letter to Mr. Potter? A. That was the same letter.

Q. Oh, the same letter? A. Yes.

Q. Did you thereafter have a running correspondence with Mr. Potter or with anyone else with regard to
570 reapportionment? A. No, sir. I think the Committee of 39 or some such committee up here would send me running material of their views, and I also got old material from other people who had had views on the subject. I got hold of a copy of the complaint filed by you, I believe, in this civil action so that I could get an understanding of that.

Mr. Clement Wood volunteered on July 9th to send me his notes that he took down when General Cox spoke at York Harbor, Maine on the subject of reapportionment.

Q. Mr. Wilson, I think we are running very short of time and I don't want to be limited in my examination. Do you suppose you could shorten your answers a little bit for me? A. Well, this is the general way I went about preparing myself for the meetings of the committee.

Q. You have been referring now for some time to a series of letters and documents in your hand. Can you identify them? A. This is my own office file, which is File No. 1872, on Delaware reapportionment, which my secretary started for me as soon as I understood that I was to be a member of this committee.

Q. Do you consider that file to be confidential?

571 A. No.

Q. Would you mind having it marked in this case? A. May I thumb through it to see if there is any particular item that I feel is confidential?

Q. Surely. A. I can't recall any, but I don't want to violate anyone's confidence before I turn this file over to you.

There is nothing confidential in here, sir.

Mr. Theisen: May I ask that this be marked?

Judge Biggs: Marked for what purpose?

Mr. Theisen: I would like to examine it, your Honor.

Judge Biggs: For identification only, you mean?

Mr. Theisen: Yes.

Judge Biggs: Very well. Let it be marked for identification.

(The file on Mr. Wilson was marked "Plaintiffs' Exhibit No. 1 for Identification.")

By Mr. Theisen:

Q. Do you need this file when you testify? A. That depends on your questions.

Q. All right. Mr. Wilson, did you speak with the Gov-

ernor, for example, before the meeting of July 12th? A. I have no present recollection—I will put it the other
572 way. I do have a present recollection of talking to him on the telephone on one or two occasions before I attended the first meeting.

Q. Did you get the Governor's views on reapportionment? A. That he is in favor of it.

Q. Did the Governor express any views with regard to population being used as a factor? A. I truly do not recall.

. . . . . .

573 Q. Did the Governor give you his views with regard to population, if you remember? A. Do you mean by that a population factor that we should consider?

Q. Yes. A. No, he did not.

Q. When you met the first time on July 12, 1962, you met, as I understand it— A. May I amend that answer, or let me put it this way: Did you mean before the committee met, because after the committee met the Governor was heartily in favor of this population factor. He thought this was a terrific plan.

Q. My question of course was before you met. A. Well, I just wanted to be sure.

Q. And your answer is no? A. He did not, before.
574 I thought that is what you meant.

Q. Now, the first time you met, as I understand it, was at the Highway Commission Office at the bridge, is that correct? A. Yes, sir.

Q. That was July 12, 1962? A. Yes, that is correct. It will show on the minutes, but I believe that is correct.

Q. Well, of course I didn't have the minutes available but I do have the reports of the newspaper accounts of this, and as I understand it, on the first meeting the Bipartisan Committee agreed on a House based upon population. Am I correct in that? A. Would you give me the second volume to refresh my recollection and I can answer you.

(Mr. Theisen handed the volume to the witness.)

A. Mr. Schmittinger, our secretary, also took notes, and at the beginning of each subsequent meeting he would refresh the committee on what had taken place at the last meeting. At the outset of the meeting on July 17, 1962, there is a summary by Mr. Schmittinger as to what we accomplished at the first meeting, found on pages 98 and 99—do you want me to read it or let the record stand—

575 Q. I think it is very simple. Did you or did you not at that first meeting agree on a House based upon population? A. No, sir.

Q. You did not? A. We got this far: The fifth principle was that the lower House be apportioned on a general population basis as follows: The present 35 Representative districts as presently constituted shall be entitled to a minimum of one Representative.

I am sorry, that motion was never actually voted upon. We discussed that proposition but we never got to a vote on it at the first meeting.

Q. Was this meeting an open meeting? A. Yes. There were members of the press present, members from the radio station, or representatives from the radio station, and we did not advertise that the public was invited but if any member of the public came and was curious and interested, we would be happy to have them sit and listen.

Q. Do you know a political writer by the name of Jack Russell? A. Yes.

Q. Was he present at that first meeting to your recollection? A. I can't recall. There were various po-

576 litical writers present at various meetings.

Q. I hand you a newspaper article entitled, "Reapportionment" with the headline "Ten More House Seats, All in North, Proposed," dated in ink, Journal, July 13, 1962, and ask you if that refreshes your recollection as to what happened at the organization meeting? A. No, sir, I stand by my prior testimony.

Q. Do you have any idea where Mr. Russell would get these figures from? A. My prior testimony was, reading

from the minutes, that these matters were discussed but no vote was taken. There was preliminary discussion of these matters but no vote was taken, sir.

Q. All right, then, there was a preliminary discussion. When did this preliminary discussion become a final proposal? A. Now, it is going to take me some time to answer this particular question because, as I explained in some of my prior answers, we took this thing step by step, proposition by proposition, and in this way we were able to successfully hammer out a unanimous report.

Q. Would it help you, Mr. Wilson, if I started off with your first step then? Your first step, as you testified on direct examination, was that you started with a geographical content of the Senate, is that correct? A. The
577 first step was we unanimously endorsed the principle of two Houses; a bicameral system, for Delaware.

The second step was that the upper House, or Senate, should be apportioned on some rational geographical basis.

The third step was that the geographical basis be the three counties with seven Senators from each county.

The fourth step was that the present historic Senatorial districts shall be preserved.

Now, the fifth matter that we discussed at the first meeting was whether or not the lower House should be apportioned on a general population basis and whether or not the present 35 Representative districts should be preserved. Also we discussed population factor figures of 20,000 and 15,000, and we took no votes on those.

Q. Mr. Wilson, my question was, would it help you any if I took what I consider to be your first step, as I understood it, starting with the geographical content of the Senate. Would it help you any if we started on that basis? A. The only thing that would help me as far as accuracy is concerned would be to thumb through these volumes and to define the very moment and the very language of each principle that we adopted. This can be done. I see no—

well—and this will disclose to you how we took this thing step by step. I can dig it out—

578 Q. Is it all set forth in the minutes that you are referring to? A. Yes, sir. The only minutes that are missing are part of the minutes of the first meeting when the tape recorder ran out of tape.

Q. Let me ask you this: Do you have contained in those minutes all of the material that was used by the committee in arriving at the decisions, or are there references to the material that you used in arriving at your conclusions? A. There would be references. I would say that each member of the committee assembled a considerable mass of material themselves, just as I did in my own files, and some of this, when there would be discussion, a committee member would refer to certain material that he had observed and read, and we would have the benefit of that material.

Q. More specifically, is there any reference in these documents that you produced, the minutes, to a consideration of the population of the State of Delaware by any census figures? A. Oh, yes, 1960.

Q. Fine. Now, what did those population figures reveal with regard to the population of the State of Delaware, county by county? A. I believe I have it in

579 that folder on the basis of district by district.

(Mr. Theisen handed the folder to the witness.)

Q. Did the committee discuss the figures as they related to county by county? A. The discussion would come up in this way: We had the representative districts because we were concerned with the population factor that we were going to use in the various representative districts; we were going to apportion it on a basis of population, some population factor.

JUDGE BIGGS: You mean them?

THE WITNESS: Them—the House, I mean, them, as far as the districts were concerned.

So as we would discuss each one of these various population factors we had under consideration somebody would make a notation as to what the make-up of the House would be under this population factor.

By Mr. Theisen:

Q. Well, we are talking now, I thought, Mr. Wilson, about the make-up of the Senate, and I asked you what population figures you had before you and which populations you applied as you talked and decided about representation in the Senate? A. None.

Q. You mean that the committee didn't consider
580 population at all in arriving at an enlarged Senate?

A. Right off the bat the representative from Wilmington, at the very beginning, said that he felt there should be a Senate composed of equal representation from each county on a geographical basis, and in a very short discussion the committee approved this in principle, and so since we had then and there decided in principle that the make-up of the Senate would be on the Federal system and would be represented on a geographical basis and not on an apportioned population basis, we were not concerned with population, sir.

Q. Now, there are several questions I would like to ask you about that, and the first is: The representative from Wilmington that you refer to, of course, is not one of the plaintiffs in this action, was he? A. I do not know who the plaintiffs in this action are. I can tell you who the representative was, that it is Mr. Poppiti.

Q. Mr. Poppiti made the suggestion, did he not? A. Yes.

Q. As a matter of fact, you know he is not a plaintiff in these proceedings, do you not? A. I have never seen a complete list of plaintiffs.

Q. As I understand what you worked out in House Bill 574 was that you would keep the Senatorial districts
581 in New Castle County, you would add two in Kent, and two in Sussex, and you would add two in each

of the lower counties by dividing the existing counties into districts, you took half of the—you took five districts from each county, did you not, or took ten districts, I am sorry, you gave five to each district in each county? A. That is right, on an east-west division.

Q. Did you compute at any time the population either one of the four districts? A. No.

Q. You did not give any consideration, did you,—A. You want to know how that was done?

Q. No. I asked you a question. Did you give population any consideration in making that division? A. None at all.

Q. I believe you said that you agreed on the Federal analogy. Am I correct in that? A. That is right.

Q. Will you tell me how the Federal analogy would apply to the system that you had worked out? A. With regard to the Senate?

Q. Yes. A. Well, the analogy we used was the fact that in the Senate of the United States there are
582 two Senators from each of the states without regard to poulation; also, in allocating two Senators at large from substantially half of the geographical area of the two lower counties we used the analogy of where you have Congressmen at large in some of the states when they apportion their representation in the Congress of the United States.

Q. Where in the Federal analogy do you find anywhere that Senators are elected from districts in counties? A. Well, the analogy comes from assuming that each one of the Senatorial districts is a state, insofar as the State of Delaware is concerned.

Q. Did you believe that each county had sovereignty? A. Did we believe each county had sovereignty?

Q. Yes. As a state has. A. This was discussed, and the pros and cons of whether or not the counties of Delaware had historic sovereignty, whether it had been eroded away, whether it has it today, this was discussed. We ar-

rived at no basic conclusion as to whether or not each of these three counties had sovereignty. No.

Q. Mr. Wilson, as a matter of fact, wasn't it the consensus of that committee that the counties in Delaware did have a sovereignty, an old, old sovereignty that
583 existed through to today? A. Had an historic sovereignty?

Q. Yes. A. Yes. I believe this, and I believe other members of the committee believed it, although we did not undertake to resolve it by formal action.

Q. But you believed that counties have sovereignty, didn't you? A. Had an historic sovereignty.

Q. Yes. At the time you were sitting as the chairman of this committee you belived they had sovereignty, did you not?. A. You mean today?

Q. Yes. A. I believe that their historic sovereignty has been substantially eroded away.

Q. I see. But was any of it left? A. As far I am concerned?

Q. Yes. A. Yes. I believe that Sussex County has retained some of its historic sovereignty.

Q. Right. And is that the reason why you felt that the Federal plan or system could be used and applied in Delaware? A. Heavens, no. That is not the only
584 reason; that is only one consideration.

Q. What are the other considerations? Are there any super-Senators that are elected in the United States? A. There are super-members of the House of Representatives elected in the House of Representatives of the United States, and we are dealing here with the question of principle.

Q. Then you are combining the Federal analogy as it applied to both the House and the Senate, and applying that to the Senate of this State. Is that correct? A. We found an analogy in the Federal Congress for this principle that we incorporated into our plan.

May I say this, that as far as this question of the super-Senators was concerned we were confronted with evolving

a plan that would meet with, we hoped, the approval of this Court and in this litigation, and this was a matter that concerned Sussex County and Kent County, and was of no concern to these plaintiffs so long as this Court would approve equal representation on a geographical basis insofar as the Senate was concerned.

Now, how Sussex County selects its seven Senators, if it is entitled to seven Senators, it seemed to us was no concern of yours or your clients; this is a Sussex County problem, and if a particular voter in Sussex County
585 did not like this method they could attack it, but we did not see how you could if we were entitled to seven members.

Q. I understand. Was the problem of the super-Senator posed and brought up at any time during your discussions? A. You mean by calling him a super-Senator?

Q. Yes. A. I don't know who first coined that phrase, whether it came out in the newspaper, or whether you did, or whether I did. It may be in this record. I do not know. It is so intertwined with the rest of my recollection, who can claim the credit of authoring that phrase, I don't know.

Q. Let us turn for a second to the House of Representatives. You say that you agreed at some point to put that on a population basis? A. Yes. That was one of the very first things or propositions that we discussed when we turned our attention to the House.

Q. What prompted you to put the House on a population basis? A. We felt this Court had a gun at the back of the General Assembly of Delaware, and we had better apportion the House of Representatives on a population basis under Baker versus Carr, and as fast as we could.

Q. You have read Baker versus Carr, have you
586 not? A. Yes.

Q. And you had been aware, I am sure, that the court had disapproved in Baker versus Carr discrepancies or variations that were four to one, didn't you? A. Just a moment. Do you have the first volume of this? I can

read to you exactly what my understanding of Baker versus Carr was at that particular time because I asked each member of the committee who was an attorney to express for the benefit of all the committee what his interpretation and meaning of Baker versus Carr was.

Q. Yes, but I am just asking you, Mr. Wilson, what your interpretation was and your understanding of what had been disapproved by the Supreme Court in Baker versus Carr.

MR. BOVE: It might be helpful if speaking of Baker versus Carr if we made it clear what decision Baker versus Carr the witness is being questioned about.

JUDGE BIGGS: I assume you mean the first opinion in Baker versus Carr, do you not?

MR. THEISEN: Yes.

THE WITNESS: That is what I am referring to.

MR. BOVE: If it is the first opinion in Baker versus Carr I object to the question as being based on a false premise.

JUDGE BIGGS: Let me speak to Mr. Theisen.

587 When you refer to Baker versus Carr I assume you mean Mr. Justice Brennan's opinion?

MR. THEISEN: Justice who?

JUDGE BIGGS: Justice Brennan's opinion.

MR. THEISEN: No, I think it was the opinion that the facts were set forth, Clark's concurring opinion set forth, I believe, your Honor, that the pattern, the topsyturvy pattern of the Tennessee Legislature that was being considered by the Court at that time.

JUDGE BIGGS: That is a concurring opinion that is not the opinion of the Court.

MR. BOVE: That is right. I enter my objection on the ground the question has a false premise, your Honor.

MR. THEISEN: This is not a false premise at all.

JUDGE BIGGS: Mr. Theisen, you are referring to Mr. Justice Clark's—

MR. THEISEN: Concurring opinion.

JUDGE BIGGS: —concurring as the opinion of the Court?

As I construe the opinion of the Supreme Court it was the majority opinion, not a special concurring opinion. The majority opinion is Mr. Justice Brennan's opinion.

MR. THEISEN: Yes. I am aware of that.

JUDGE BIGGS: The only error in your statement is
588 the majority opinion of the Court.

If I concur in an opinion of one of my brethren in a special opinion, it is not the opinion of the Court, it is a concurring opinion.

MR. THEISEN: Your Honor, I think we all refer to the Baker versus Carr decision as the hundred-page decision, as has the witness, and it is in the nature that he said he read the whole thing.

JUDGE BIGGS: I think perhaps this is again semantical differences. Can't you rephrase your question so it won't be subject—so it would be correct?

MR. THEISEN: Yes.

BY MR. THEISEN:

Q. What was your understanding, if anything, Mr. Wilson, with regard to the facts in the Baker versus Carr case that you reviewed with regard to the differences of representation that was considered by the Court as being in violation of the 14th Amendment? A. I did not understand Baker versus Carr to determine the merits of the litigation. I was of the opinion that it decided three things: That the Court possesses the jurisdiction of the subject matter, that a justiciable cause of action was stated on which the appellants were entitled to appropriate relief, and that the appellants had standing to challenge the Ten-
589 nessee apportionment statute.

I also paid particular attention to Justice Stewart and particularly to Justice Clark, because I felt Justice Clark laid down at least some indication of what the guide lines would be in a situation like that.

Q. Were you following Mr. Justice Clark's portion of the opinion when you and your committee approved of a

General Assembly—a House of the General Assembly that provided for deviations as much as 17 to 1 in districts in population?

MR. O'DONNELL: Objection.

JUDGE BIGGS: What is the objection?

MR. O'DONNELL: The basis of the objection is there is nothing in the record to show that such approval was made.

JUDGE BIGGS: I think the objection, frankly, is de minimus. I think we will take the answer. The witness is a member of the Bar and a very competent one.

A. To what are you referring? I understand that under our plan there will be a Representative from one district that has 1,600.

BY MR. THEISEN:

Q. 1,643. You were aware of that, were you? A. Oh, yes.

Q. And that, of course, was the 15th of New Castle
590 County, was it not? A. Yes. And then under our plan there would be a possibility that there would be a district with 22,500 period, with one Representative.

Q. With one Representative, and at the same time you were perpetuating, were you not, the 15th District and its representation of one Representative? A. That is right.

Q. Is that right? A. That is right.

Q. You did the same thing with the 14th District which had a population of approximately 2,300, as I understand it? A. I believe that is correct.

Q. When you did that did you study the population history of the 15th District of New Castle County? A. The past history of that particular district?

Q. The past population history of that district? A. No. We studied the population trends of Delaware over the past ten years.

Q. Did you study the growth pattern trends for the various districts in all of the counties? A. You mean each district separately?

Q. Yes. A. No, sir. I did not. Maybe some of
591 the other members. You are speaking of me personally?

Q. I am speaking of the committee through you. A. I don't believe that this past history of the growth trend of each of the representative districts separately was studied by the committee as a whole. It may have been studied by individual members.

Q. You did not know, for example, in the seventy years that had passed from the 1890 census to the census of 1960 that the growth pattern in the 15th District of New Castle County had been something less than 200 in population in seventy years? A. I did not know that.

Q. Prior to your appointment to this Bipartisan Committee by the Governor, Mr. Wilson, I certainly know that you practiced law a good number of years in Sussex County and are a very prominent member of the Bar and an outstanding citizen of this State, and I mean every bit of that; but I question, Mr. Wilson, what work had you done in the field or reapportionment prior to your appointment? A. This is the first work that I had done in the field of reapportionment, Mr. Theisen.

Q. What member of the Bipartisan Committee if any had done any prior work in the field of reapportionment? A. I seem to recall that Mr. Ernest S. Wilson, Sr. ad-
592 vised the committee that he had been studying this problem of reapportionment for a number of years; but whether he had actually done any work in the sense of writing treatises or a pamphlet or a book, or giving it special study, or working out a plan for application to a particular situation, and so forth, I don't know. But I seem to recall that he did indicate that he had given study to it, and also Mr. O'Donnell by virtue of his work upon this case had worked in the field of reapportionment.

Q. Well, this case, you are aware, I am sure, was only started on June 5th of this year, and you were appointed somewhere around July 5th. So there had only been a

month intervening, isn't that correct? A. You asked me what I knew about the other members working in the field or reapportionment. I am only telling you this is all I know.

Q. Let me ask you this: Did Mr. Ernest Wilson, Sr. or Frank O'Donnell offer to this committee any work that they had prepared in advance for the committee? Did they suggest any plan that was in any concrete form? A. I believe you will find throughout this transcript that they made numerous offers and suggestions and entered into the discussion rather fully and gave us the benefit of their knowledge, learning, and experience.

593 Q. But that was an oral experience in testimony, and so forth? A. Yes, this is what I am speaking of now.

Q. You met for the first time on July 12, 1962. You met again on July 16, July 21, and submitted your report on July 23. A. July 17 instead of the 16th.

Q. I am sorry. A. Yes, this is correct.

Q. The newspapers reported that this Bipartisan Committee had submitted a report out of haste and compromise. Would you so characterize the report of the Bipartisan Committee? A. No. There are numerous things that the newspapers say that I do not agree with.

Q. Your Bipartisan Committee report was to a whole committee, was it not? A. Yes.

Q. And you gave to the whole committee a whole report? A. We had this mimeographed and each member of the whole committee got copies of it and they asked questions and we gave an explanation. Several members of the Bipartisan Committee, shall I say my committee—

Q. Surely. A. (Continuing) spoke to the commit-

594 tee as a whole on the report and we undertook to answer all questions, and there was considerable discussion.

Q. Now, then, your whole report was not simply House Bill 574, was it? A. No, sir.

Q. What else did it contain? A. It contained three features. One was an immediate plan of reapportionment, which is the House Bill to which you just referred. Another was the calling of a Constitutional Convention, or at least putting the proposition on the ballot of the last election, which would be the first step. And the other was another amendment to the Constitution whereby if the electorate decided in favor of a Constitutional Convention, it could be held within a shorter period of time than September of 1965.

Q. Now, then, as you recall, who were the proponents of a Constitutional Convention being put on the ballot in November, and who were the proponents of speeding up the amendment? A. Let me put it this way: I will bow to no man as far as my own advocacy of both of these proposals may be concerned, so I am one of the proponents, and a very ardent one.

Q. Who were the others, do you recall? A. Mr.
595 O'Donnell, Mr. Cavanaugh, I believe Mr. Ernest S. Wilson, Sr.—let me put it this way: At the end of all the discussions we all became the proponents and all subscribed to the report. I know, at the end of our discussions, of no one who at that particular time was opposed to these other two steps as a part of the plan because the opportunity was afforded at the very outset that if we were not able to reach a unanimous report, there would be a minority report. But this was unanimous, and I think the very last minute of the last pamphlet that you have here before you shows that the report in its entirety was unanimously approved.

Q. Notwithstanding the unanimity of the committee, and so forth, in support of the entire report, it is a matter of fact and record, is it not, that the only matter that was passed by the legislature, by whom you hoped this report would be given some credence, was the amendment to the Constitution known as House Bill 574? A. That is right. The Senate did approve the calling of a Constitutional Convention, as I recall. The House never did—

Q. But it required the concurrence of the House— A. It did not concur by a three-quarters majority, or whatever the required majority is under that provision of the Constitution.

596 Q. So that it was defeated in the House, was it not? A. As I recall, it came up twice.

Q. And both times defeated? A. This is correct.

Q. Likewise the amendment to speed up the Constitutional Convention of course failed also, did it not? A. I don't recall exactly what happened to that. Let's put it this way: It never happened, even on one leg.

Q. Now, Mr. Wilson, there was one other feature of this report that I should like to ask you about. Do you remember that the Constitution of 1897 provides that in the event of the calling of a Constitutional Convention that you do so in accordance with Article 16, Section 2 and provides for 41 members to be selected from the 35 old representative district and two from each county at large? A. Yes.

Q. Do you recall that? A. Yes, sir.

Q. Now, then, did your committee consider that phase of the Constitution at all?

JUDGE BIGGS: Mr. Theisen, this is certainly a subject not covered by the examination in chief. How does this go into any issue that is presently relevant to this Court?

597 MR. THEISEN: This I believe, your Honor, is where you ruled—

JUDGE BIGGS: Yes.

MR. THEISEN: And it is where I objected—

JUDGE BIGGS: Yes.

MR. THEISEN: —stating that I intended to go into this.

JUDGE BIGGS: I didn't know you were going into this. The point that I made was, it seemed to me, since the Constitutional Convention had not been called, I didn't have in mind—in fact, I had forgotten this other provision of speeding up. But how is this speeding-up feature relevant to our present issue?

Mr. Theisen: No, sir, this is not the speeding-up feature, your Honor. Part of our complaint alleges that House Bill 574 is unconstitutional also because it embodies two separate matters.

Judge Biggs: This is a question of law, is it not?

Mr. Theisen: Yes, but I would like to know—

Judge Biggs: A pure question of law.

Mr. Theisen: This is the committee that recommended this.

Judge Biggs: Well, do you think this committee is more competent to pass upon legal questions and more
598 in the field than this Court?

Mr. Theisen: This is precisely what this witness has been put on the stand for by the defendants, to show the intent of House Bill 574, what was in back of it. I now want to know why a particular portion of House Bill 574 was placed in there and what was the intent in back of it.

Judge Biggs: It seems to me to be too far, but we have gone very wide indeed today. We will permit the question.

Mr. Theisen: Your Honor, this is part of our complaint.

Judge Biggs: I realize that, but this is cross-examination, not your case in chief. You have not called this witness as your own. This is a question of the scope of cross-examination. I will let you ask this question only on this subject. Really we must draw a line somewhere.

A. I think I know what your question refers to, but would you make it more specific and then we will each know what we are talking about?

By Mr. Theisen:

Q. Mr. Wilson, a portion of House Bill 574, and the last bit of it, the tail end of it, provides that notwithstanding the provisions of the bill about subdividing districts with 15,000 population or more, that for the
599 purposes of any Constitutional Convention that was called, the delegates—you remember this? A. I am with you now.

Q. —the delegates should remain as they were under the Constitution of 1897 and should not be affected by the provisions of House Bill 574. A. Yes.

Q. Now, I ask you, what was the discussion, if any? What was the intent of the committee in making that recommendation, if the committee made that recommendation? A. Why, some of the committee from the lower part of the State expressed some fear as to whether or not the reapportionment of the House under our plan would automatically result in a reapportionment of the delegates to a Constitutional Convention that we were proposing to call. They wanted to make it exceedingly clear that it would not. And so in order to arrive at what I felt and which the committee felt was one of these historic compromises for which this nation is rather famous we spelled it out, that it would not affect the delegates' strength to a Constitutional Convention that we were proposing to have called.

JUDGE BIGGS: I think this is as far as the Court desires this issue to be pursued, Mr. Theisen.

MR. THEISEN: May I have a moment to confer, please?

600 JUDGE BIGGS: Yes.

(Mr. Theisen conferred with his associate counsel:)

MR. THEISEN: No further questions.

MR. O'DONNELL: No questions.

JUDGE BIGGS: I wanted to make a statement. I want to make it perfectly clear that this Court does not regard itself as having a gun in the back of the General Assembly. We have our duty and the General Assembly has its to perform, and in our respective fields this Court assumes it will do its duty, and the General Assembly will do its.

Thank you. Mr. Wilson.

We will start again at 10 o'clock tomorrow.

I may make one statement that has nothing to do with the merits of the case.

I assume and I hope this case will go to the Supreme Court of the United States. Your record here is getting very large indeed, and will be quite expensive. That is all.

We stand adjourned until 10 o'clock tomorrow morining.

(At this point the trial was adjourned to Friday, January 25, 1963, at 10 o'clock a. m.)

4. Court Exhibit 4: Court's Reapportionment Plan

[Caption Omitted]

POSSIBLE REAPPORTIONMENT

Using the map of the voting districts of the three counties (an exhibit to the original bill of complaint), inserting populations and combining adjacent districts, the following result can be achieved:

For instance, by combining the 1st and 4th Districts of Wilmington, the 11th and 12th of New Castle County, and the 13th, 14th, and 15th of New Castle County, you get rather interesting results:

Districts	*Pop.*	*Representatives*
1 plus 4	13208	1
2	33772	1 plus 3
3	18539	1 plus 1
5	30488	1 plus 2
6	58228	1 plus 6
7	47509	1 plus 5
8	23428	1 plus 1
9	20040	1 plus 1
10	40293	1 plus 4
11 plus 12	12726	1
13 plus 14 plus 15*	9395	1

* The 15th District of New Castle County will soon have an additional 1200 voters (estimated) because of the coming of Shell Oil Co.

By combining Kent County as follows, we get the following results:

Districts	*Pop.*	*Representatives*
1 plus 3	13161	1
2	17806	2
4 plus 6 plus 9	12900	1
5 plus 7	17005	1
8 plus 10	10097	1
		6

By combining Sussex districts, we get the following results:

Districts	*Pop.*	*Representatives*
1	9641	1
10	12359	1
7 plus 8	9580	1
9 plus 6	12281	1
2 plus 3	15876	1
4 plus 5	13458	1
		6

These districts which have been combined are contiguous. Using a basis of a minimum population of 10,000 per district* plus one additional representative for each additional 7500 of population would indicate 34 representatives for New Castle, 6 for Kent and 6 for Sussex.

* The 13th, 14th and 15th of New Castle and the 1st, and 7th and 8th (continued) of Sussex would arbitrarily be allowed one representative.

5. Def. Ex. 1: Minutes of the Bipartisan Committee on Reapportionment and Constitutional Convention

STATE OF DELAWARE
BI-PARTISAN COMMITTEE ON REAPPORTIONMENT AND CONSTITUTIONAL CONVENTION

Sub-Committee meeting held in the Administrative Building, Delaware Memorial Bridge, New Castle County, Delaware, Thursday Evening, July 12, 1962

PRESENT:

HOUSTON WILSON, (Chairman), Georgetown,
HAROLD SCHMITTINGER, (Secretary), Dover,
MAURICE A. HARTNETT, III, Dover,
THOMAS L. JOHNSON, Rehoboth,
GERARD P. KAVANAUGH, Wilmington,
FRANK O'DONNELL, Wilmington,
MICHAEL A. POPPITI, Wilmington,
ERNEST S. WILSON, SR., Wilmington.

(Transcription of a tape recording of the proceedings supplied by the Sub-committee.)

TRANSCRIBER'S NOTE

Inasmuch as I did not have the benefit of hearing any of this meeting, I have no memory guides to assist me with the task of deciding which speaker made which remarks. Thus I have left blank the spaces where the name of the speaker should appear, unless I was fairly certain of identification. The majority of the time it was impossible to determine exactly who was speaking, other than in the case of the Chairman and the Secretary, both of whom I have reported personally often enough to recognize, and Mr. Harnett.

Where blank spaces appear in or at the end of sentences, this is due to the fact that despite concentrated effort for many, many minutes I was unable to decipher the sound, nor imagine the correct word or phrase to insert. These blanks

were caused by passing trucks, laughter, coughing, banging tobacco pipes on ash trays or metal baskets, overlapping voices, indistinct pronunciations, or words so rapidly spoken they are impossible to separate into intelligible words against the background noises.

I felt it wiser to leave blank the speaker's designation, rather than risk attributing the wrong observations to a particular member of the sub-committee.

There has been no charge made for pain and suffering!

* * * * * * * * * * *

2 MR. : Shirley (Seward) in the Levy Court uses that stenotype, and maybe we can persuade the Levy Court to help us out.

MR. POPPITI: O. K.

MR. : I have heard of her using the stenotype in meetings I have attended recently.

MR. POPPITI: Well, I'll see.

MR. : It has some merit, because I had occasion to appear before the Levy Court two weeks ago, and we were trying to refresh our recollection about some understanding, and she pulled out her notes and cleared it right up.

MR. : Sure. That's why I think we really ought to have somebody take that type of notes.

MR. : Yes, because people can get into a discussion and perfectly honestly you will hear what you want to hear, and someone else will hear what he wants to hear, and neither one will hear the same thing.

THE CHAIRMAN (Houston Wilson): I would suggest, then, that Mr. Schmittinger, our secretary, make arrangements with such Democratic assistance as he may need, with the levy court of Sussex County, Kent County, or New Castle County, whichever one you think it should be, to arrange for the stenographic taking of the minutes and the transcribing of them.

MR. : Suppose you and I approach the levy court on that basis. Maybe they might help us.

MR. POPPITI: All right. What is her name?

MR. : Shirley Seward.

THE CHAIRMAN: I would suggest that possibly the first thing we ought to do is to have me assign each of you about two minutes to make a brief statement of the purposes and functions of this meeting, so that we can perhaps come to some understanding as to why we are here and what we hope to accomplish, so we can have a clear understanding of what our own sense of duty and responsibilities may be.

So I will start here on my left. Mr. Poppiti, would you like to start out by telling us why you feel we are here and what our responsibilities are?

MR. POPPITI: Well, to begin with, I happen to have participated in the bipartisan meeting which Governor Carvel called, and the reason for calling the bipartisan meeting was to explore ways and means to meet the court threat of reapportionment head on. It was the consensus, and you have probably read newspaper accounts, but the consensus of opinion at that meeting was that this problem of reapportionment should be met by the people, themselves, in their Legislature rather than have the courts tell us how to reapportion ourselves.

As a result of that meeting, which agreed in principle with what I have just stated, this subcommittee was suggested, consisting of four political representatives from each party from each of the four political subdivisions.

Now, political subdivisions in the sense that where political parties are organized. And, of course, we are here having been instructed in a sense by the bipartisan committee to explore ways and means (1) either to meet this problem by recommending that a constitutional convention be held, or (2) by coming up with a plan of reapportionment, which we could then bring back to the committee of

the whole, and hope that the committee of the whole could then persuade the members of the Legislature to go along with that bipartisan program.

Personally, I feel that we ought to address ourselves to what might seem to be the easiest decision to make, to see if we can't agree that we should at least get the question of whether or not there ought to be a constitutional convention on the ballot. Having met that easier problem, at least in my opinion, we would then address ourselves to trying to formulate a plan of reapportionment which would be palatable to all the segments of the State represented here.

THE CHAIRMAN: Thank you, Mr. Poppiti.

Mr. O'Donnell?

MR. O'DONNELL: I would like to endorse what Mr. Poppiti has said, and I would like to speak for a second in a slightly different capacity.

I am representing several parties in a suit that is pending in the Federal District Court here for the District of Delaware.

The Court recently met with the attorneys of record, and it is my judgment that the Court will promptly take some steps to implement the Supreme Court's recent decision, if we do not do something.

I can't say that the Court won't take some concrete steps, even if we endeavor to do something, ourselves, with our own Legislature. However, it is our opinion that if we don't do something, ourselves, the Court will. Hence, I feel that we should as promptly as possible take some affirmative steps to show the Court that we intend to correct the inequities which exist.

The question of apportionment has been submitted to the political committee of which I am chairman, and we have unanimously endorsed reapportionment.

So I would like to say now that I am in favor of doing something, as far as I am concerned, and I hope this committee will do something. And I have rather an open

6 mind about what we should do. There are not very many alternatives available to us, but I will suggest that we adopt one of the Legislative alternatives.

I hope I haven't misstated the Court's position. But that is the way I have interpreted it, that they are going to be very firm in the matter. And they have set the first argument for less than two weeks from today.

MR. HARTNETT: Define, please, what the argument will be about.

MR. O'DONNELL: The first argument will be on my motion, or the motion of several other defendants, for a stay of proceedings, to give the Legislature—I am trying to quote the language which several of us used—a fair opportunity to reapportion.

The second argument will be held a little more than two weeks from today. Other motions are under consideration in that argument.

I think that if we could show the Court that we were about to take a concrete step, or that we have done so, it certainly might be persuasive and help any decision that might be rendered.

MR. : Frank, have you gotten any impression from your suit that the Court would be satisfied with
7 only the constitutional convention approach?

MR. O'DONNELL: I can't say what the Court's position will be, except that I feel they will be firm and expect something to be accomplished.

THE CHAIRMAN: All right, Senator.

MR. JOHNSON: Well, as I understand the purpose of this committee, we are meeting to recommend a plan of reapportionment to the Governor. This is more or less of a subcommittee to make this recommendation, and also to recommend whether or not we approve of the constitutional convention.

Insofar as reapportionment is concerned, it has been a matter that has been discussed for many, many years. For the several years I have been in the Legislature, it has

been discussed and just never got anywhere, but now it seems to be a matter of having to do something, more or less being forced into it by the Supreme Court's decision. And I may add that I have been in favor of reapportionment for a long time, since I voted for it and co-sponsored a bill, especially in connection with the House of Representatives.

I am not in favor of relinquishing any of the senators we have in the lower counties. I am in favor of having an equal representation from each of these counties. But so far as the House is concerned, I am perfectly willing to go along with some plan, either the plans that have been suggested in the bills, or some plan that may come from this meeting.

THE CHAIRMAN: Thank you, Senator Johnson.

Mr. Hartnett.

MR. HARTNETT: Oh, I thought I was going to be last.

I think it has been stated pretty much already what we are supposed to do. I don't think there is anyone in this room who doesn't realize there must be reapportionment. The question is what is the best way to do it.

I think the big question is to devise some plan that will be practical in the sense that it can be enacted, and will be enacted by the General Assembly. I think that is our biggest problem.

THE CHAIRMAN: Mr. Kavanaugh.

MR. KAVANAUGH: Well, not having participated in the meetings of the parent group, and from which meeting it is my understanding that the concept of the subcommittee was formulated, my own impressions are hearsay, second-hand to say the least, garnered in part from the newspaper publicity which has been given to this, and in part from the Republican counterparts that were at that meeting. And I would say that in my own mind at the moment from those two sources principally, the responsibility of this subcommittee is to attempt to reach agreement on two separate pieces of legislation: (1) A bill setting forth a plan for reapportionment of representation

in the General Assembly of the State of Delaware; and (2) a bill providing for a constitutional convention; and that the recommendation of this committee would be forwarded to the parent body, which is the group that met in the Governor's Office from Delaware, and that it would carry with it our recommendations and any specific legislation in those two fields which this subcommittee could agree upon; that the privilege of a minority report was preserved, and the other rules of committee functioning.

That, Mr. Chairman, concludes my summation of my understanding of what the purpose, function, and scope of this committee is.

THE CHAIRMAN: Let me ask you something, those who were there, in connection with what you said, that is, to forward our report back to the parent committee. I was not a member, also, and I am somewhat in the dark as to exactly what our function is.

Is this your understanding, that it goes back to the Parent Committee? And then do I understand from that the Parent Committee is going to consult with our Governor in order to resolve the question of whether or not it will be a feasible matter to recall the Legislature to consider and take action upon any proposal which we make to the Parent Committee, and which they feel should be submitted to it for its disposition——

MR. POPPITI: Because it was the feeling that if we agreed on something, it would reflect a truly bipartisan approach, and presumably from that kind of report being submitted and then coming out of the Parent Committee, the Legislature might be persuaded to go along with it, because it would have been persuaded by those of us from every segment of the State.

THE CHAIRMAN: I see.

MR. O'DONNELL: That Committee had hoped that our report would be made to them by the third week in July.

MR. JOHNSON: July 23rd was the date I understood it to be.

MR. POPPITI: Well, according to the newspaper, I said the week of July 23rd.

THE CHAIRMAN: Yes, well, we can get into that later. I would like to see if we can't take this next step first.

Mr. Wilson, we would like to hear from you on what you think this committee should do.

MR. E. S. WILSON: I, too, was not there, but I concur in Jerry's interpretation of what we have gathered from Bill Roth's attendance at the meeting, and also from the
11 newspaper reports.

I would just like to add one thing, and that is, there might be two programs of reapportionment that we might want to consider, and one is if the Court does decide that Section 2 is unconstitutional, I think this committee should have a scheme, or plan, that would be effective right away. And to me that is our greatest hazard and job.

Secondly, there might well be a reapportionment plan that would be, shall we say, less of an emergency, a little longer range thing.

Then, of course, the third one would be the constitutional convention.

That is all I have.

MR. SCHMITTINGER: I would simply add that it is our understanding that we are not dealing with alternatives; in the sense that we are either going to recommend a constitutional convention or an amendment.

I also understand that we can perhaps suggest that we pursue both methods at once. Is that correct?

MR. HARTNETT: I think it was left open. We could pursue either, or none, or both.

MR. SCHMITTINGER: And the only other thing I want to say is, I think that we should for many reasons in
12 discussing the reapportionment aspect consider and adopt what has been referred to as the federal principle, that the three counties would have equal representation in the senate as the states have in the United States Congress.

THE CHAIRMAN: Gentlemen, let me see if I can perhaps summarize this discussion. Perhaps we can come to some agreement or understanding.

It has been brought out that we are to consider either a definitive plan of reapportionment for our State General Assembly; or we are to consider recommending that a constitutional convention be called; or we are to consider both of those aspects.

We are to make our report to the Parent Committee, and that report may be either a unanimous report, or a majority with a minority report attached.

The Parent Committee is then to consider our report and make its recommendations to the Governor with respect to the practicality of calling a special session of the General Assembly to take action upon our proposal as considered and possibly revised by the Parent Committee, with some hope and expectation that definitive action would be taken by the Legislature thereon.

I understand that we must always keep in mind
13 that Delaware is confronted with litigation with regard to whether or not, as I understand the constitutional issue, Delaware presently has a rational plan of reapportionment, or whether on the other hand they have a plan which can only be defined as

Is this a fair and honest statement of what the issues are that have been defined so far?

I think that I would like to add just one more thought to this, and that is this, which came out in one of your suggestions: That this committee must deal with the practical aspects of the problem which confronts it. And the practical aspect, as I view it, is to submit proposals which we feel have some hope of definitive action on the part of the Senate.

It would be an idle and futile thing for this committee, regardless of our own personal feelings about it under the present state of the litigation, to submit to the Parent Committee and to have it in turn recommend to the Legis-

lature a plan which we cannot conscientiously feel in our own mind has some practical hope of passage.

It seems to me that if we should submit a plan, or plans, in the alternative or together which we feel has from a practical point of view no hope of passage, then we would be doing our own State a great disservice in the eyes
14 of the Nation and in the eyes of the courts. For then it would be said that here was a committee that dealt with this problem, and came up with a plan which it was willing to recommend, and then the State, acting through its General Assembly, saw fit to ignore or not act upon it, and therefore this is some evidence at least that the State of Delaware, through its duly constituted representatives, are not acting in good faith in this matter.

I don't think that we would want to do that disservice to the position of the State before the Court. We would not want to do that disservice to our State in the eyes of the world.

I think this is to me something that perhaps is a matter of State pride, and the ability of your State and my State to deal with its internal problems.

Is there anything else that any of the rest of you would like to add to what I have undertaken to state as a summary of why we are here?

MR. KAVANAUGH: Well, for the record, Wilson, I would like to at least make this remark, that your restatement summation of the remarks of the members of the committee are entirely in accord with my understanding of what the scope and function of this committee is. And secondly, the criteria and standards which you laid down gently in your capacity as Chairman are admonitions that I think we will all subscribe to.

15 MR. SCHMITTINGER: I appreciate your reference to the record, Mr. Kavanaugh. (Laughter.)

MR. POPPITI: That reflects his training. You have six lawyers at this table.

THE CHAIRMAN: I think possibly the second step, with your permission, that we ought to approach at this time,

is to ask the lawyers on the committee, if I may, what is their concept insofar as they had an opportunity to study the opinions of the Supreme Court and the several state courts that have already acted on this matter? In other words, what is the present status of the litigation throughout the Nation as nearly as we have been able to discover with respect to the width of discretion that any state may have in dealing with this patricular problem? What are the guidelines, as they conceive? Do they conceive the State is limited to a single approach? Or do we conceive that a state in the solution of its own internal problem with respect to apportionment has a certain amount of discretion? If so, how wide may that discretion vary?

Am I making myself clear as to what I am trying to lay before the committee?

What I am trying to say is this, that dealing with legal aspects and constitutional aspects, is the channel a narrow one, or is the channel a broad one? And where are
16 the limits of our discretion in the terms of the discretion of this State in the approach to the problem?

MR. O'DONNELL: Now, the matter is, or has been, under consideration in several states. I have read decisions from Pennsylvania, Wisconsin, and New York. My reading of those decisions does not furnish the answer to your question.

In Pennsylvania the matter was for all practical purposes thrown out of the state court.

In Wisconsin the three-man Federal Court ordered the legislature to take action by certain times.

MR. : Five days.

MR. O'DONNELL: Yes, within five days.

The legislature did adopt a plan which was vetoed by the governor.

MR. : Was that five days of the original decree, or——

MR. O'DONNELL: Oh, no. Five days after the entry of the order by the Wisconsin Court.

MR. POPPITI: If I may interrupt, Frank, it is a terrible chore for you to recall from memory, for anybody, this. Mr. Ernest Wilson has here photographic copies of certain pages of the publication known as Law Week, which is put out on a weekly basis by the Bureau of National
17 Affairs in Washington. He has photographic copies of six different issues, and each issue carries what purports to be the latest ruling of some Court in the jurisdictions of Tennessee, Georgia, Idaho, Alabama, Maryland, and Michigan, with the most recent being that of the Maryland Court on July 3.

Now, just for the record, we could ask the Secretary to read pertinent parts of these by way of summation, or summary of what these Courts have held, if this is the Chairman's wish.

THE CHAIRMAN: My feeling on the thing now, if I may interpose here, is that I would like to have the committee share the benefit of the preliminary statement from each one of you attorneys with respect to their concept. I am sure that most of you have seen this or have read it.

I know that as far as I am concerned, I have read and tried to digest some thousands of pages—I think it would amount to about a thousand pages. I can list the cases in Law Week that I have, and I have copies of what you are talking about here, but I think in fairness to all the other members of the committee, that perhaps since we have six lawyers here, we can at least get some guideline as to their thinking on the thing, before we start deliberating upon what is to me, acting for the committee, I mean speaking on behalf of this committee, which in turn is supposed to be some sort of guide to the State acting through
18 the Legislature as to what are the limits of the State's discretion in acting upon this.

With your permission I am going to ask Mr. O'Donnell to continue his own analysis.

MR. O'DONNELL: Well, briefly, from the cases I have read, I haven't found any limitations placed upon the

method which the State may follow. I believe that if Delaware should follow either of the constitutional routes available to it, the Court might find either of them to be satisfactory, even though both of them will take a considerable amount of time. However, that is merely by approval.

MR. POPPITI: Frank, is Houston asking——

THE CHAIRMAN: No, no, no, I am not asking that. I am asking this: Let us assume now that reapportionment is now a judicial Constitutional question, and that there are certain limits within which a State must keep its apportionment of the General Assembly in order to stay within the equal protection clause of our Constitution.

What I want to find out is, can we arrive at some concept in our own thinking as to how wide discretion the State has as between a rational plan on the one hand, and an invidious discrimination on the other?

This is the $64,000 question we are all hoping the
19 Supreme Court will answer sometime, but at least we ought to have at this stage some concept of what is the width of the channel, or how narrow that channel is.

MR. SCHMITTINGER: Well, Houston, I think you have answered the question. I think this great Supreme Court case which is the catalyst that has brought this about, Baker vs. Carr, you and the other attorneys know came up on a motion to dismiss. And all the Court there decided was simply that the question of reapportionment was not only a political question that the courts were prohibited from looking into. The merits of the case were not considered, and we have no guidelines as to what the Court would accept or would not accept.

MR. POPPITI: I would personally feel that since the United States Supreme Court has stepped in, that we are to come up with a plan of apportionment that, well, in the final analysis the federal plan, that is to say, we would apportion our House on a population voting basis, and apportion the Senate, say, on a geographic district basis; that I would think if we came up with a plan less feasible,

for example, equal apportionment of the Senate by counties, and some population proportionment of the House. And I would think that the Court would sustain that kind of apportionment as being Constitutional.

And, personally, that is the kind of plan that ap-
20 peals to me. Because, let's face it, we have got to recognize that, as you said in your summation, we have got to take a very practical approach to this problem. We have got to come up with something that in the final analysis will do the job, but it must be palatable to those people in the State who are going to give up something, as well as to those in the State who are going to receive something. And I think much must be said for preserving the equality of the Senate among the three counties, and having the other House perhaps a larger Assembly represent the population.

Because I feel in this fashion that some of the smaller districts which would not qualify for representation in the House would nevertheless have representation in the Senate. And, after all, in my opinion, most of our government in the Legislature is a matter of compromise, and in this way each side can preserve their rights and positions.

MR. HARTNETT: I agree with Mike.

One case I might mention is the case decided by the Idaho Court. Unfortunately it was not decided by the Federal Court in Idaho, but was decided since Baker vs. Carr. And the Idaho Supreme Court upheld apportionment of the Idaho Legislature, which provided that a representative district could have one member, even though the representative district did not have sufficient popu-
21 lation to qualify under a quotient of dividing the total members into the total population.

I say, I think this is a significant opinion, although unfortunately only by a state Court.

The only other thing particularly noteworthy was the original Maryland case. And that is noteworthy because Maryland's constitution is like Delaware's, in the sense

that it has no provision for reapportionment by the general assembly, and legislative districts were set forth in the Maryland constitution.

That was a Maryland State Court, the Court of Appeals for Maryland. They, of course, ruled that the Maryland method of apportionment, as set forth in the Maryland constitution, was unconstitutional, and directed the legislature to do something about it, and to do something about it by statute rather than by any constitutional agreement.

I haven't found any case that sets forth really, one, two, three, four, five, what the standards are.

MR. POPPITI: Houston, I would think those are our guidelines, but I think there is also implicit in our discussion another problem that I thought you were alluding to, and that is, how much action would be required by the Legislature as a result of our deliberations here——

THE CHAIRMAN: I was going to reach that.

22 MR. POPPITI: That is the $64,000 question——

THE CHAIRMAN: There are two $64,000 questions. One is, how close is the gun to our back? And the other is, if the gun is right up against our back, what discretion do we have in answering the real question?

As I read Baker vs. Carr, insofar as it lays down any guidelines to any state in dealing with this problem—and understand it is repeated again and again in Baker vs. Carr, that this was all the Supreme Court decided, and this is a very brief concurring opinion of Mr. Justice Stewart. That is this: The Court today decides three things and no more: (a) that the Court possessed jurisdiction of the subject matter; (b) that the justiciable cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) . . . that the appellants have standing to challenge the Tennessee apportionment statutes.

Now, that's all the Court decided in Baker vs. Carr. But in reading through the hundred pages of that opinion, I do feel that some of the justices let drop some guidelines as to the question of discretion on the part of the state, and

perhaps Clark made it more clear than any of the others just what his concept of the discretion is, and that is this:

The truth is, although this case has been here for two years and has had over six hours of argument, and
23 has been most carefully considered over and over again by us in conference and individually, no one, not even the State or the dissenters, has come up with any rational basis for Tennessee's apportionment statute.

No one contends that mathematical equality among the voters is required by the equal protection clause. But certainly there must be some rational design to a state's districting.

The discrimination here does not fit any pattern—that is in Tennessee. As I have said, it is but a crazy quilt.

My brother Harlan contends that other proposed apportionment plans contain disparities. Instead of chasing these rabbits, we should first pause long enough to meet the appellant's proof of discrimination by showing that in fact the present plan follows a rational policy.

Then we get over to the very brief opinion of Mr. Justice Stewart, and he makes it more clear.

The complaint in this case asserts the Tennessee system of apportionment is utterly arbitrary, without any possible justification in rationality.

The District Court did not reach the merits of that claim. This Court quite properly expresses no view on the subject. Contrary to the suggestions of my brother Harlan, the Court—meaning the Supreme Court—does not say or
24 imply that state legislatures must be structured as to reflect with approximate equality the voice of every voter. The Court does not say or imply that there is anything in the Federal Constitution to prevent a state acting not irrationally from choosing any electoral legislative structure it thinks best suited to the interest, temper, and customs of its people, and contrary to the suggestion of my brother Douglas the Court most assuredly does not decide the question, may the state weigh the vote of one

county or one district more heavily than it weighs the votes in another?

In McDonald vs. Greene, the Court held the equal protection clause does not deny the state power to secure a proper diffusion of political initiative as between thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former.

In case after case arising under the equal protection clause the Court has said, again only last term, that the Fourteenth Amendment permits the state a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. In case after case arising under that clause, we have also said the burden of establishing the unconstitutionality of the statute rests upon him who assails it.

Now, is this some indication of the width of dis-
25 cretion that Delaware has, or is it not, like Clark and Stewart say? Or are we limited, as perhaps the thought has gone out, to at least apportioning one house of our Legislature with a high degree of mathematical certainty? Or does the State of Delaware have the discretion, in its wisdom, as was said, or choosing any rational elective legislative structure it thinks the best suited to the interests, temper and customs of its people? Or, as Clark has said, no one contends that mathematical equality among voters is required, but there must be some rational pattern, and where the discrimination does not fit any pattern, but is a crazy quilt.

This to me is something that deeply concerns the State of Delaware or any sovereign state. This is something that I don't think the Supreme Court has answered with any degree of certainty, but it has in these concurring opinions laid down some guidelines, that you have a feeling there have been some practical applications of Baker vs. Carr to some given state situations on either the supreme

court level in some of the states, or on the district court level.

Am I right, Mr. O'Donnell?

MR. O'DONNELL: Practical in the sense that——

THE CHAIRMAN: They have a particular plan.

MR. O'DONNELL: That they have been compelled
26 to move forward with a plan, such as in Michigan.

THE CHAIRMAN: And they have banned certain plans they have had.

MR. HARTNETT: But all of the cases I have read since Baker vs. Carr have always said it is true the Supreme Court didn't say it, but the courts since then, the district courts and the appellant courts of the states, there must be some recognition given to more populous areas.

I don't think anyone would say it has to be 100%. You are never going to have districts that are absolutely equal. But you have got to give some recognition that a larger populated district is entitled to more representation than a smaller populated area.

THE CHAIRMAN: I certainly agree with you that any plan that can be approved as being a rational plan must have a rather large ingredient somewhere in that plan with respect to the ratio of population in one district to another.

MR. : In the lower house.

THE CHAIRMAN: Yes. But I don't think it requires absolute—now, whether it requires it in both houses, or just one house is still an unanswered query.

MR. POPPITI: I would think that because we have two houses, that this does give us an opportunity to come
27 up with a rational plan which will meet the requirement that the populous areas be given recognition at the same time you preserve the rights, as one of the justices said, of thinly populated areas. I think fortunately by having a bicameral legislature you can work out a plan which will meet the requirements of both groups.

MR. KAVANAUGH: Well, look, may I just talk off the tongue, my own, a little bit?

THE CHAIRMAN: Yes.

MR. KAVANAUGH: In a broad panorama of this whole thing, I think basically you have got to start out with certain fundamental principles, and one is that we have a republican small iron form of government. Now, this to me means a representative type of government in which the people have chosen to have themselves governed with their consent by their chosen representatives. Now, to the extent that they surrender their right or power to govern themselves to an elective legislature, then I think, as the Court points out in its wisdom in consideration of this thing, that it has laid a bracked within which it hopes that the states will take care of their individual problems of representation on the state level.

To paraphrase what Baker vs. Carr says, a rational plan of reapportionment. And to that I would add a reasonable standard, a standard or criterion, if you will, would be some expression in your Constitution, which again is the voice of the people, as to how they wish the legislature to represent them during the ensuing years that a legislative body is in being pursuant to a constitution, which is the governing organ of the people of the state.

Now, the next point I would make is this, that the Constitution of the State of Delaware, of all the state constitutions which I have had an oppotrunity to look at, is the most rigid on this question of the composition of bot houses which comprise our General Assembly—the most rigid.

And in many of the cases we are dealing with here, it has been the failure of the legislature to do something which their own state constitution permits. They have failed to take action.

Under our State Constitution there is no room for the Legislature to take action.

Now, again we have an entirely different situation from that confronting the Court in Baker vs. Carr. And my caution is that we regard our particular charge or commission as a subcommittee and confine ourselves within the

ambit of our own problem here; within the brackets, as Mr. Wilson has read from Baker vs. Carr.

And with that I would conclude my remarks.

29 THE CHAIRMAN: In other words, what you are saying is that your feeling that the nearer the State gets to mathematical apportionment, the more rational plan; the farther away it gets from mathematical apportionment, the greater the chance that it will be construed to be irrational?

MR. KAVANAUGH: Yes.

THE CHAIRMAN: Now let me go on and say this, as I conceive it, the farther away you get from mathematical apportionment in either one or both of your houses, the more irrational the plan becomes, unless, as I see it, the State does it in its wisdom by reasons of a plan which the State feels, and which the Court can swallow, is better suited to the interests, temper, and customs of the people.

In other words, if you get away from mathematical apportionment, you must substitute a good, sound reason for doing this. And at least McDonald vs. Greene recognizes that.

You can get away from it to some degree. What the degree is when you consider the diffusion of political initiative as between thinly populated counties and massive-populated counties.

MR. HARTNETT: I would like to remark to Mr. Kavanaugh that the Maryland Constitution is very similar to Delaware's and has no provision in the Maryland Constitution for apportionment, and the District Court said it was unconstitutional.

30

THE CHAIRMAN: The New York case was remanded. That case was reported in Volume 30, No. 48 of the Law Week, Page

There it was found that upon a fixed geographical center, and upon a fixed geographical house of representatives, based upon the Constitution of 1894 of New York; and that seems to be a case that was sent back by the Supreme

Court on June 11, 1962, to the three-judge Court of New York.

MR. HARTNETT: Was there a decision in that case?

THE CHAIRMAN: No, it has just been sent back under Baker vs. Carr. The three-judge Court dismissed, and each judge wrote an opinion, and each judge came to the conclusion that the case should be dismissed, but upon different grounds. They didn't agree upon the grounds of dismissal.

MR. HARTNETT: That was decided before Baker vs. Carr.

THE CHAIRMAN: And it came up before the Supreme Court, and the Supreme Court sent it back, and again Justice Harlan dissented.

MR. POPPITI: Could we clarify this a little bit by agreeing that the Senate should be on a geographical basis, and the House would be on a——

THE CHAIRMAN: The Supreme Court hasn't said this yet.

31 MR. HARTNETT: No, he means we, here.

THE CHAIRMAN: Oh, we, here.

MR. KAVANAUGH: First of all in establishing some guidelines for ourselves, I think we ought to decide on whether or not we are going to talk about a bicameral or a unicameral type of general assembly.

Our historical concepts and our traditions teach us that it should be bicameral. We have the House and the Senate. This, then, to me, to my thinking, injects still another standard which may be applicable in addition to your pure mathematical type of thing where you get into representation of one representative for a certain number of people. And as long as your standard is reasonable, whether it be area, whether it be geography, or whether it be the complexion of particular metropolitan area—for instance, the Convention Debates of the 1896 Convention teach that one of the motivating factors for assigning Senators to the City of Wilmington was the type of population they have as urban as opposed to rural, it was tran-

sitory, it was largely people who were employed in the heavy industries that existed at that time in Wilmington, as again compared with the purely rural or agricultural communities as the rest of New Castle, Sussex, and Kent knew. And these were the basic concepts which influenced Delegates to the Convention to accept this principle
32 of two for Wilmington, five for the rest of the counties, including Sussex and Kent in the Senate, and whether it was part of their thinking that as coincidence, or as a deliberate part of their thinking about this thing, it also turned out that the population of Kent, Sussex, and rural New Castle County was within 3,000 people one to the other.

Once you ignored the City of Wilmington under the population of 1890 which was estimated roughly at 75,000—when you took that out of the New Castle population, the 1890 population of the rest of New Castle was in the neighborhood of 35,000. Sussex, I believe, was 38,000, which was 3,000 more, and Kent was 32,000, which was 3,000 less.

Now, these are the figures that were in the Convention Debates.

MR. : I can verify that Mr. Kavanaugh is doing his homework well.

MR. KAVANAUGH: This to me was very interesting from an historical standpoint. And this to me is what I would regard as a reasonable standard within the framework of our rational plan of reapportionment, when we are considering a bicameral General Assembly.

MR. HARTNETT: Well, are you in accord with the statement that someone made that we feel most of us
33 agree that the Senate should be on an equal basis, and the House should be on at least some type of recognition of population?

MR. KAVANAUGH: Where there is some rational relationship to population.

MR. HARTNETT: Yes. Are you agreeing with that, or are you disagreeing with it?

MR. KAVANAUGH: My own principle with respect to the standard to apply would be one of basing it on population for the Lower House, and equal representation on a geographical—geographical, an area, a district basis as far as the Senate is concerned.

MR. : Well, I think we are all agreed on that.

THE CHAIRMAN: Well, perhaps we can take one rather substantial step forward and lay that by. Would someone like to propose——

MR. : Mr. Chairman, I was trying to sketch one out here. I think I have it moved along far enough that I can improvise the balance.

I would like to move that this committee endorse the principle that the General Assembly of the State of Delaware be composed of two houses.

THE CHAIRMAN: Bicameral.

34 MR. : Is that as far as you want?

MR. : I would like to stop right there.

MR. : All right, I will second that motion. So we can get that out of the way.

THE CHAIRMAN: Any further discussion? Or are you ready for the question?

All those in favor? Perhaps we'd better have a show of hands on this.

It is unanimously approved.

MR. : Mr. Chairman, I would like to further move that the Upper House, or Senate, of the General Assembly be based upon, or apportioned on, a reasonable geographical basis.

THE CHAIRMAN: Do I hear a second?

MR. HARTNETT: Second.

THE CHAIRMAN: Any discussion?

MR. : Yes, I would like to have a discussion on the definition of the word, "reasonable."

MR. HARTNETT: I think we ought to accept this now and I can see where we are coming to.

MR. : Well, I don't understand the word——

MR. HARTNETT: What should be the geographical breakdown. But I think that's——

MR. : No, no, I don't think we have to
36 define a geographical area by metes and bounds. All I am asking is what your understanding is generally in your use of the word, geographic?

MR. : Land area.

MR. : We are agreed that——

MR. : Without regard——

MR. : Use 'portionment on a geographical basis as being based solely upon a given geographical area, land area. In other words, by subdividing the land area and giving each segment of that land area representation in one of the bodies.

MR. : Preserving county lines.

MR. : We haven't encountered that argument yet.

(At this point on the recording tape there are so many voices overlapping it is impossible to transcribe the discussion with any degree of accuracy.)

THE CHAIRMAN: If we use the terminology that is employed by the Court, perhaps we could say upon some rational geographic basis.

MR. : I will substitute the word, rational, for reasonable.

THE CHAIRMAN: That's what the Court said, so we will——

37 MR. KAVANAUGH: Well, again, just for purposes of furthering the discussion, using a negative approach, this eliminates, then, any consideration of the Upper House of applying any standards with respect to valuation, taxation, population, industry, the nationality factor, or any of these other ethnic arguments which very often are advanced in trying to achieve a measure of adequate representation.

We are talking now limited to the Upper House. And I am just trying to square in my own mind what we mean when we use the word, "geography." We are talking about a land area.

MR. : Land area, geographic.

MR. KAVANAUGH: Exclusive of other considerations.

MR. : That is the way I would express it, yes.

THE CHAIRMAN: Do we have a second?

MR. HARTNETT: Yes.

THE CHAIRMAN: The motion is now open for discussion. Are you ready for the question?

All those in favor of the motion—do you want it read again?

MR. : No. We understand it.

THE CHAIRMAN: All right, all those in favor of the motion signify by raising their hand.

38 It is unanimous.

I have one other preliminary matter for discussion that I think ought to be brought before the committee, and that is this: We have agreed here that we must come up with something that is practical in the sense that we feel it would be afforded a fair opportunity of consideration of passage, whatever we come up with. From this point on, do you feel that before we take any definitive action, that whatever resolutions or reports we set, that they be accepted tentatively with the thought in mind that each of us before we make a final, conclusive vote upon the important subject matter, should go back to our respective counties, call the members of the General Assembly into conference, and tell them about what our tentative conclusions are, and get their reactions to our tentative conclusions, solely from the point of view of being able to advise each other, when we assemble again, as to our own reaction as to whether this is practical from the point of view of any hope of success?

MR. HARTNETT: I wouldn't want to make final recommendations until I went and consulted with constitutents.

THE CHAIRMAN: In other words, there is a possibility that we may come up with something that we feel is rational, which we feel is proper, but which from a practical point of view, in the framework within which we view the word, practical, when we sound out the members of the Legislature, we will say, well, this has no hope of success.

MR. KAVANAUGH: I wonder if we ought not to remind ourselves that in a sense we are an ad hoc group of still a parent organization which is one representative of the complexion of the community and State, and since we have been called upon to make a report, that as we adopt certain parts of it seriatim as we go through this arrangement, it has never been my understanding that all of the parts necessarily must equal one hundred. I can agree with certain parts from time to time, of the whole. But in viewing the entire report which we may be called upon to submit, I may have fundamental differences of opinion, seeing the various parts in relation one to the other.

Now, I subscribe wholeheartedly to the first two things that have come up. But I can imagine, because I am a human being, that as this thing shapes up, and all of its pieces fall in, the jigsaw may not form a perfect square. It may be rectangular, or it may even be some other shape which geometrically may not agree with the total concept of my system, my philosophy of representative government.

And again I remind all of us that our function is a limited one, both as to scope of the matter and as to time.

As I understand early remarks, the week of the 23rd is heavily encroaching upon all of us.

THE CHAIRMAN: This is on preliminary matters.

MR. KAVANAUGH: No, this is the final report, as I understand it.

MR. : During the week of the 23rd, we should make a report to the committee, and arguments will be

held before the Federal District Court on the motion to stay.

Now, both of you gentlemen have raised in my mind the question of our function and scope.

Are we to report back to the committee what we think would be desirable, what we think might succeed both in court and in the Legislature? Or are we to report back our findings after sounding out our respective districts?

I think that the matter might be extremely desirable, but I wonder if we have the time to do that at this time.

MR. POPPITI: I think the latter function is going to be the function of the committee of the whole. Once we have filed a plan which presumably will be representative of what we think coming from our different sections of the State is a palatable plan, then it is going to be up to the political leadership to evaluate and see whether or not it can be put in front of them.

41 I think that is really our more basic function here.

MR. HARTNETT: I think that all that Mr. Kavanaugh has said is that he, and I agree with him, would like to reserve the right to vote against the final recommendation or recommendations, whatever they may be. And I agree. I think the fact that we might all go along with all of the parts, yet I would like to reserve the right to—I am not saying I will—to vote against the final recommendation or recommendations. There may be alternative recommendations, for all we know.

MR. KAVANAUGH: I might also add this, that if there are ten parts, and I have voted in favor of all ten, I am going to be in pretty much of a bind not to subscribe to the total picture.

Now, this sounds a little bit facetious. It is not intended as such, but at this point in our proceedings I have no idea what the ultimate direction is going to be.

All I am saying is that I am saving my vote as to the total. Now, piecemeal I am certainly in accord at this point with what has been said and what has been done.

I would like you to continue if you have other items to add to your series.

MR. : I thought we could get certain preliminary matters out of the way, and then maybe stop
42 talking about those and move on. That is all I had in mind.

THE CHAIRMAN: I do get back to this problem Mr. Poppiti has stated, that he felt that we should sit here passively and view the technicalities of the situation and then take what we feel is proper and practical back to the committee, and then let them sound out the members of the Legislature.

I can see two bugs in that particular approach that I want to lay before you. One, timewise it may delay the matter beyond the time that it would take us to arrive at certain tentative or preliminary conclusions subject to a final vote on the whole, as Mr. Kavanaugh has pointed out.

If we could take back some of these tentative conclusions to our respective counties and sound them out and then bring back to this committee the benefit of our own sounding out, we may come up with something——

MR. : Mr. Chairman——

THE CHAIRMAN: I don't know how it works in New Castle County, but as far as my County is concerned I think perhaps Mr. Johnson and I can say that we would have no great difficulty in getting a considerable majority of our representatives together at a suitable place and sound them out in a matter of 12 to 15 hours and come back here with our findings.

MR. : Well, Houston——

43 THE CHAIRMAN: And thus expedite things. I would hate to see us come up with something that we sitting here by Delaware Memorial Bridge feel is not only rational and proper, but practical, and then have it go before the Central Committee, and they sound it out, and at that

particular stage they say, we don't think this is practical. Go back and work some more.

Mr. KAVANAUGH: Mr. Chairman, I would like to acknowledge the presence of the Press and say that the members of the parent organization are going to read what we have so far deliberated on in tomorrow morning's papers.

THE CHAIRMAN: Perhaps you think we will get it by phone call. (Laughter.)

MR. POPPITI: Let me clear one thing. I hope you didn't get the impression that I will be operating in a vacuum. Because I will be constantly in touch with the I think all of us will.

MR. HARTNETT: I think we are getting ahead of ourselves. I think we ought to proceed to get the plan, and then discuss how we want to implement it. And I think the only question here is—and maybe we can all agree on it—as Mr. Kavanaugh has said, that we all of us reserve the right to vote, yes, or, no, on the final plan or plans when we evolve it. That's all.

THE CHAIRMAN: All right, does somebody want to put that in the form of a motion?

MR. HARTNETT: Well, I don't think we have to have a motion.

THE CHAIRMAN: I just wanted to be sure that——

MR. HARTNETT: Understand, I have no power or authority—(Unintelligible overlapping.)

THE CHAIRMAN: I understand, but from a personal point of view as you are called upon to vote on each segment of the plan, it is understood that by voting upon each segment of the plan, you are not surrendering anything with respect to your vote on the final plan.

Very well.

MR. KAVANAUGH: I would like at least to conclude my own thinking on this matter, that we proceed with dispatch, and due deliberation, to the consummation not only of legislation, which is our function, but also a report and rec-

ommendations to accompany the legislation, and with all deliberate speed.

MR. : Amen.

(Following a recess:)

THE CHAIRMAN: Shall we reconvene?

I have no committee on the dispatch of business, and I am sort of shooting from the hip, so to speak.

I have two suggestions to make to you at this time as to how we proceed from this point on.

We have conceived as our job to consider a constitutional convention and a specific plan for reapportionment of Delaware—one or the other, in our final report.

Now, I can proceed from this point on in one of two manners. I suggest that we divide ourselves into two committees, and that these committees meet and formulate a committee report with each of the aspects of our problem, or start right here now and take up first one, and then the other, and have each of us speak to it as to, Number One, the consideration given in our report to a constitutional convention in the light of the "Sword of Damocles" which is hanging over the State of Delaware. Then call upon each of us to lay before the committee our own present thinking as to the kind and type of plan we ought to discuss, argue, and come to some final conclusion on with respect to a specific plan of reapportionment.

Now, I would be perfectly willing to entertain discussion at this time as to how we should proceed now, whether to divide up into two committees and get to work on one aspect, and the other aspect to report back I would appoint a committee, say, as to specific plans of apportionment, and I would conceive that they would consider a number of plans of apportionment, and put it on a report as to what types of plans of reapportionment we should consider without taking into consideration the relative merits of any of those plans, so we can knock our heads together on the various plans that the committee thinks up.

MR. SCHMITTINGER: Mr. Wilson, I wonder if I might, before we get into that, see if I understand where we have left off.

I would like to put a motion, and I do make this motion, that the Upper House have as its geographic basis the three counties as presently constituted, and that each of these three counties have equal representation in the Senate.

MR. HARTNETT: I would like to second that.

THE CHAIRMAN: We have a second.

MR. HARTNETT: I would like to comment on that a little bit.

THE CHAIRMAN: Yes. Perhaps I should suggest three committees, or three areas of discussion.

MR. HARNETT: I don't think we should have committees yet. I think we ought to proceed and try to find out how close we are to what we think would be a fair reapportionment plan that would have a reasonable chance of being enacted. I don't think we are going to arrive at it tonight.

I would like to know—maybe we are not very far apart

Maybe we are very close in our thinking. And I

47 am inclined to think more so as we go along here tonight. Because if we are close on what we think would be a fair reapportionment, naturally that would affect how I would vote on the question of a constitutional convention, or by a constitutional amendment.

Instead of having a committee go off and bring back something that may not be anywhere near what the consensus is here, we ought to try to get the consensus of what we feel would be a reasonable and practical reapportionment plan, and I think Harold's motion is one step in that way. If his motion meets with the approval of everyone, and maybe it will, then we have disposed with the Senate, and we can proceed with the House.

THE CHAIRMAN: Very well.

MR. POPPITI: My personal feeling along those lines is that the Senate would remain undisturbed, and continue as a

17-member body, and that we reapportion the house on a mathematical basis, preserving the representation that is there, and in a sense expanding the representation. So that we would guarantee those smaller geographic, thinly populated areas an opportunity to grow, and continue to be represented in both branches of the Legislature.

MR. KAVANAUGH: You wouldn't favor any consolidation of existing representative districts where they are very, very thin?

48 MR. HARTNETT: Couldn't we dispose of the Senate, at least get our ideas on the thing first? There are two ideas with respect to the Senate thus far. Could we see if there are any others?

THE CHAIRMAN: Before we get to that, I am going to amend my prior remarks with respect to three areas of discussion, that is to say, a plan for the Senate, a plan for the House, and a plan for a constitutional convention. Do you want me to take them up and get our respective thinking on them now one by one, or do you want committees appointed to go to work on alternate plans which the committee feels this committee as a whole should consider and thresh out and knock our heads together on?

MR. KAVANAUGH: I think this committee is small enough that we can act as a committee of the whole rather than to split off into subcommittees.

MR. SCHMITTINGER: I don't think you could examine some of these problems separately from the others.

THE CHAIRMAN: No, but I mean the committees would formulate the plans to be examined together for the committee's report. I don't think that the committees would necessarily come up with something they, themselves, would recommend, or would be final. Within these various segments, there would be alternative plans which we

49 would consider, and I was wondering whether or not all of us are in a position to say these are all of the plans that should be considered, or should committees give some thought to Plans One, Two, Three, Four, Five

for the House, and One Two, Three for the Senate, and Plan One or Plan Two for a constitutional convention, so that we would have the benefit of not narrowing our thinking in respect to the plans. This is the problem here.

MR. SCHMITTINGER: I think you are right; but on some of these things we may not have a problem.

MR. HARNETT: We may get one, but we are not that far along yet.

MR. JOHNSON: I think maybe we are making it too tough. I think Mr. Poppiti started the ball rolling here. He expressed his opinion as to what he thought the Senate should be.

MR. : Well, let's give it a try.

THE CHAIRMAN: Without committees, all right.

We will take up the Senate now.

MR. KAVANAUGH: Before we address ourselves to that, Frank, you had started out by giving a unanimous expression, first of all, with respect to the matter that there will be a bicameral General A mbly.

MR. POPPITI: We are beyond that, aren't we?

MR. KAVANAUGH: Yes. Secondly, that the Upper
50 House, or Senate, would be apportioned on a geographical—a rational geographical basis.

Would it now behoove us to say with respect to the Lower House, or House of Representatives, that it is the consensus of this group unanimously that it be reapportioned on a population basis?

MR. O'DONNELL: You are directing that to me?

MR. KAVANAUGH: Yes.

MR. O'DONNELL: I can't speak for the group, but my own opinion would not be that. My opinion would be that—we are getting away from the Senate, but I would recommend that the present representative units be retained, and that a mathematical figure be fixed so that when any representative unit achieves another measure of that figure, additional representation will be added.

This is the Federal system for the House. Delaware, even when it was so small, had one. When we achieve a certain number, we will pick up——

MR. SCHMITTINGER: I would like to say I agree with your thinking along these lines.

MR. HARTNETT: I think we would agree with your statement that the House would recognize population——

THE CHAIRMAN: Well, Gentlemen, I would like the committee to consider these one by one with the thought in mind that as we consider them one by one our conclusions would be purely tentative in the light of the whole.

SEVERAL MEMBERS: Sure, sure.

THE CHAIRMAN: Otherwise we are going to leap from one to the other. So I am going to direct your attention back to the Senate.

We are at this particular stage in the Senate where we must now consider what is a rational territorial or geographical plan of reapportionment of the Senate.

MR. POPPITI: I would like to reiterate that in my opinion the Senate should be left as it is, that in my opinion it does already represent geographical areas, and it would seem to me that it should be preserved as is, that we should address ourselves principally to reapportionment of the House of Representatives.

MR. O'DONNELL: I think it is rational at the present time. I think it can be defended in its present status. I think it could be more rational, but I believe it is rational at the moment, and I would like to see it left as it is.

THE CHAIRMAN: Senator Johnson.

MR. JOHNSON: Well, I would be willing to let New Castle County retain their five, Wilmington two. I would like to see Kent and Sussex Counties raised to seven, so that we would have seven, seven, seven, on an equal county basis.

MR. : I would subscribe to that.

MR. JOHNSON: And rather than have them selected at large from each of those counties, I would suggest the first five Representative Districts elect one, the second five elect another Senator from each county. That would be recommendation.

THE CHAIRMAN: All right.

MR. HARTNETT: I subscribe to the idea that there ought to be equal representation in the Senate from each county. I appreciate Mr. Poppiti's position, and can well understand why. And it may be that you will make note that there are two different theories, and proceed.

THE CHAIRMAN: Mr. Kavanaugh.

MR. KAVANAUGH: Well, can I just talk for a minute?

THE CHAIRMAN: You can talk right.—(Laughter.)

MR. KAVANAUGH: Well, sometimes, you know, talking out without coming to any definite conclusion helps some, at least helps me sometimes to formulate.

As I view the New Castle County picture where you have five Senators from the area outside of Wilmington, and two Senators in the City of Wilmington, there was a time when Wilmington was the center and only urban unit
53 within a county of any significance or size.

We are addressing ourselves here to posterity, as I view it, not to an immediate, temporary, this-trip-only type of solution. I can visualize in the future with the construction of a twin unit for the Delaware Memorial Bridge, the ferry at the end of our State, the completion of the over-the-water and under-the-water route at the tip of the Peninsula, where the entire length of the Peninsula is going to expand measurable population increases, increase in industry, increase in many of the aspects of living that normally designate a vigorous economy in a community, and that these things are necessarily going to cause the development of urban communities.

We are already witnessing a substantial increase in the City of Newark. Dover is expanding. Seaford is a logical area for expansion. And other communities which are

towns today may very well in our lifetime be sizable urban metropolises.

I think we should remember that if you preserve the concept of a geographical designation uniquely, singly, and exclusively for the City of Wilmington, is it your intention to foreclose Dover should it attain a population or an importance equal or comparable with 95,000 people and the industry of Wilmington?

I think, after Baker vs. Carr, if it was our intention, we could not bring it into being. I think that
54 we will always have reapportionment with us from now on, so that any plan we might set up will not be with us forever, but it will be until some major change is brought about. And I think if the Legislature or the constitutional convention does not take cognizance of that in the future, we will again have some litigation in the Federal courts.

MR. : Then you want to continue the rigid type of constitutional provision that we now have? You don't want to build into it a self-executing type of Senate?

MR. POPPITI: No, we are only talking about the Senate as part of a rational plan that we are admonished to come up with in the Supreme Court's decision.

MR. KAVANAUGH: But you can have a plan which can be divisible and rational with respect to the Lower House and irrational with respect to the Upper House.

MR. POPPITI: Well, I would go a little further than the Supreme Court. I say we have to come up with a rational plan that has a chance of being passed in Delaware. We are faced with the Delaware situation.

And, of course, we take the Senate as one branch of the plan, and we take the House as the other, and in the House we try to achieve the flexibility with which you are concerned.

55 MR. KAVANAUGH: Well, no. You just sacrifice the earlier remarks about a plan which would be a stopgap measure as far as the Court is concerned. If you are

saying that we have got to come up with something that the Legislature is going to adopt.

MR. POPPITI: This is our objective, yes, with the litigation in a sense being the gun at our back.

MR. KAVANAUGH: This doesn't help your Court case any.

MR. POPPITI: Sure, it does. Our objective here is to get a plan——

MR. KAVANAUGH: What you are saying is that anything we can come up with that there is a fair hope that the Legislature will pass, the Court is going to accept. And that is not true. It is a non sequitur.

MR. POPPITI: No, I didn't say that. I said we are trying to evolve a rational plan, which, if it were to be tested by the courts, it would stand the test. That is what we are seeking here.

THE CHAIRMAN: Gentlemen, I think perhaps the Chair can clarify this.

What Mr. Poppiti says is this: That we have a two-pronged problem. We must come up with a plan which is not only palatable to the Court, but also palatable
56 to the General Assembly. This is what we are saying.

MR. POPPITI: Yes, this is our ultimate objective.

THE CHAIRMAN: All right, you continue, Mr. Kavanaugh, with your thinking on this question of a rational plan of territorial apportionment, or geographical apportionment of the Assembly.

MR. KAVANAUGH: Well, I am not expressing my own belief at this point. All I am doing is narrating what I have understood to have motivated our Convention Delegates in 1896. At that time they achieved a compromise in the Senate on the theory that the three counties, exclusive of Wilmington, in the Upper Chamber were areawise, populationwise, and economywise comparable measures of representation for the Upper Chamber; that Wilmington in its exclusive capacity was an entirely different political entity at that time.

All I am addressing myself to is the fact that this no longer obtains. The situation is different, and that according to your views, the courts are now going to ride herd on us from here on out, should there be any inequities at any time.

Then perhaps we should consider from a pragmatic standpoint that which will work immediately, which will be within the framework of a rational plan with reasonable standards, and not give too much consideration to
57 the future development and growth of the State as a whole, or the counties as governmental units within the State.

This is certainly not what you mean.

MR. O'DONNELL: I said, to repeat, that I think a plan for the Senate which is based upon a rational geographic basis would be acceptable to the courts. That is exactly what I said before, and I haven't said anything different now.

MR. HARTNETT: Either of these two plans which we have talked about would be acceptable. Either the Senate on a strictly county basis, or the Senate as it now exists, either would be O. K.

MR. POPPITI: Yes, but I think Frank says one of the Senatorial plans coupled with a flexible plan for the House.

MR. HARTNETT: Oh, yes, of course.

MR. POPPITI: —We think would get us by. Sure, that is——

MR. HARTNETT: But I think it should be understood, assuming that we have a more equitable apportionment of the House, either the Senate as it now exists or on the equal county basis would be acceptable.

THE CHAIRMAN: Gentlemen, I want to get each persons' original thoughts down before us, and then we will get back to a question of debate on the thing, and I will
58 let Mr. Kavanaugh continue his original talk.

MR. KAVANAUGH: Let me conclude, then, in order not to delay this much further.

I apologize to you, Frank. I was under the mistaken impression that you had said that you preferred at the polling of the committee members the maintaining of the status quo in the Senate as it is presently comprised under the Constitution, Article 2, Section 2, namely, five for rural New Castle County, and two for the City of Wilmington. This is not what you said.

MR. O'DONNELL: I did say that. And I also said that I believed that that arrangement was a rational basis which would be upheld.

MR. HARTNETT: But you are not saying the other one would also not be acceptable?

MR. O'DONNZLL: I haven't said anything about any other plan, because I haven't talked about any other plan. But in my opinion, the arrangement which we presently have in the Senate is rational and can be defended. I still believe that it can. There is some basis for it. There is some foundation for it.

The Court has said that any crazy quilt for which there isn't any foundation or any rationale will not be upheld.

I think we have a rationale. I think we have a basis
59 for it, that it is reasonable and——

MR. SCHMITTINGER: Would you like to state what that is?

MR. O'DONNELL: I think our counties are, roughly speaking, rather similar in geographic areas; that it has the historic basis; they are governmental units that govern the people in that area, and it is not just something that was picked out as a matter of political whim. It is someting that has this basis. And I think the courts would uphold it.

MR. SCHMITTINGER: Aren't these reasons why we should have equal representation in the Senate? The reasons you just cited?

MR. O'DONNELL: On the basis of population? Or equal county?

MR. SCHMITTINGER: County.

MR. HARTNETT: What is the basis for the two additional?

MR. SCHMITTINGER: What is your rational basis for that?

MR. O'DONNELL: That Wilmington is a large geographic unit.

MR. HARTNETT: So is Brandywine Hundred.

MR. SCHMITTINGER: So is the City of Dover.

Mr. Poppiti's good clients are building so many houses down here that we are going to want a separate
60 Senator just for Dover. (Laughter.)

THE CHAIRMAN: All right, let's get back to our original discussion.

MR. KAVANAUGH: In order to continue, I will conclude my remarks. I am in favor of equal representation on a county basis geographically in the Upper Chamber. I will just let it go at that.

THE CHAIRMAN: All right.

Mr. Wilson.

MR. E. S. WILSON: I agree with Frank that, as a non-lawyer, one of the few, I believe the Court would accept a five-five-five plus two for Wilmington apportionment of the Senate, because it is an historic fact that it isn't a crazy quilt.

However, I am perfectly agreeable with Tom's suggestion of seven-seven-seven, provided at the time we recognize that we are to look at this House thing on a population basis very carefully.

MR. SCHMITTINGER: That is understood.

MR. E. S. WILSON: Oh, yes, that is understood.

THE CHAIRMAN: That caveat is always on the table.

I want to state very briefly my original thinking on this, and let it out for your consideration.

As I read the Debates of 1897 with respect to the
61 Senate, the division was five-five-five, as far as Sussex County, which was a completely rural area, Kent County which was a completely rural area, and rural New Castle County, which by its very term was a rural area. It so happened that at that particular time, accord-

ing to the census of 1890, they ranged from 32, I think, or 33,000 population. But then it was pointed out in those Debates that here was Wilmington with a population of 75,000. If you take 35,000 as the mean, then you come up with 5 into that, and you get 7,000. If you take 70,000, and divide that by 2, you come up with 35,000, and you have the 5 to 1 equal split.

I would make this suggestion to the committee, that if we are going to apportion the Senate on a rational geographical basis, that we should not even so much as pay lip service to an intense, or thickly populated metropolitan area in the sense of giving it representation per se as such.

I think what should be done is very possibly—let me back up just a minute.

The reason I say this is because if we pay lip service to and give or retain two Senators for Wilmington as such, perhaps the Court would say that the State did this in recognition of the fact that this was an intense metropolitan area, and therefore it has put into this particu-
62 lar part of its plan recognition that representation even in the Senate should be on a population basis. And having done that it would view that particular house in the light of whether or not having given lip service, or having given recognition to this intensely populated area, whether or not in that light it would be invidious and not rational.

I think that if we are going to stick to some rational geographical basis, we should stick to it and not put into the plan for the Senate or retain any plan for the Senate of two Senators for a particular area which we all know is intensely populated.

If we come up with seven-seven-seven, then I think it should be up to New Castle County to put their heads together and say, what do we feel are the territorial districts to which they should be allotted?

Now, in doing that those territorial areas can be defined not in terms of a specific metropolitan area by Wilmington, but they should be defined as given territorial segments of New Castle County which by happenstance may include or may not include all or a portion of Wilmington with respect to a specific Senatorial District.

Do you follow what I am trying to say?

MR. SCHMITTINGER: Yes.

63 THE CHAIRMAN: I don't want to sow the seed into the Senate, the seed of a plan that pays lip service on its face or otherwise to a given metropolitan area.

I think if we are going to recognize the county as the territorial division, then it should be on a county basis, and the subdivision within that county be on a specific territorial basis rather than on the metropolitan. For, as Mr. Kayanaugh points out, if we do it for Wilmington, we may be called upon at some time to do it for Dover or do it for suburban Wilmington per se.

MR. POPPITI: I would say, addressing ourselves to the practical aspect, if we are going to even things up, using the counties as the geographical basis, I think that such a plan would have a chance if we were talking in terms of increasing the representation in the Senate from Kent and Sussex Counties without disturbing the allocation of the members of the Upper Chamber in New Castle County, or in Kent and Sussex Counties. (Unintelligible overlapping of remarks.)

MR. POPPITI: I would say I think that is a better approach——

THE CHAIRMAN: Let me get back to what I was trying to say. The present constitutional provision deals with Wilmington as an incorporated municipality as such.

64 The Court has said many times, and perhaps will say again many times, that a particular legislative act at the time of its adoption may well be Constitutional; but changing events, changing circumstances, and even

new opinions of the Supreme Court will, upon again reviewing it, render it unconstitutional.

So I am wondering whether or not the present plan of the Senate, in that it deals with Wilmington per se, does not have the seeds of paying lip service, or bowing to an intensely populated area? And this I think we should seriously consider staying away from in the plan, although in the ultimate evolvement of the plan the geographical area of the particular Senatorial District or Districts may comprehend substantial parts of the City of Wilmington, but not denominated as such.

MR. HARTNETT: Yes, but Wilmington is not one district. Wilmington is split into Senatorial Districts. And all New Castle County is spit into Senatorial Districts. It just so happens that two of the Senatorial Districts come within the City of Wilmington. But it is not saying that Wilmington as such is entitled to two Senators.

THE CHAIRMAN: Well, let's see what the Constitution says.

MR. SCHMITTINGER: Just like in Dover——

THE CHAIRMAN: This is what the Constitution says:

65 MR. SCHMITTINGER: Just like the City of Dover, half of the city is in one Senatorial District, and the rest is in the other.

THE CHAIRMAN: Let's see what the Constitution says first. On the Senatorial Districts in New Castle County.

MR. SCHMITTINGER: It describes by streets in Dover.

THE CHAIRMAN:

(Unintelligible overlapping of remarks.)

MR. POPPITI: As a matter of fact, the two Senatorial Districts in Wilmington are badly out of balance as far as population is concerned.

MR. : Oh, yes, there is no question about that.

MR. SCHMITTINGER: Do you want to hear it?

MR. POPPITI: Yes.

MR. SCHMITTINGER: Well, the First Representative District of New Castle County, this is the House.

THE CHAIRMAN: The Senatorial District is what we want.

MR. SCHMITTINGER: Senatorial Districts in New Castle County are and shall be as follows:

No. 1. All that portion of the City of Wilmington lying north of and bounded by a straight line including the central line of 8th Street extending from the Delaware
66 River to the westerly boundary of said city.

No. 2. All that portion of said city lying south of and bounded by a straight line including the central line of 8th Street.

No. 3. Brandywine Hundred, and so forth.

MR. POPPITI: There is no reference to Wilmington at all.

(Unintelligible overlap of remarks.)

MR. POPPITI: I would say as a practical matter, I think we have a better chance to achieve what Senator Johnson suggested initially by saying that we would increase the representation in the Senate for Kent and Sussex Counties so that the basic geographical unit will become the county, without disturbing——

MR. HARTNETT: I agree. I don't think we should intentionally disturb anybody, if we can help it.

THE CHAIRMAN: When it comes to the House, we are going to have some difficulty. (Laughter.)

MR. : May I ask, what is the issue with respect to the Senate in the suit?

MR. O'DONNELL: They have treated it in the same manner as they have treated the House. They have asked for a reapportionment of both.

67 MR. POPPITI: This is what was done in Maryland, too. It was with regard to both chambers.

MR. SCHMITTINGER: They didn't get it yet.

MR. POPPITI: No.

THE CHAIRMAN: And this is what is under attack in Michigan, the senate as such without any reference at all to the house, if I may say. And that has been——

MR. HARNETT: But several cases have upheld the right of the senate not to be apportioned populationwise.

MR. SCHMITTINGER: I think the key to it is how the house is treated.

MR. POPPITI: Yes, because then you can say that you have a rational plan for your state.

MR. SCHMITTINGER: There is one other aspect of this that I think we have all thought of, and that is the more identifiable we can make the final plan we come up with, with the Federal system, I think the more likely it is going to be acceptable.

MR. POPPITI: This I think was the broad guideline that we have to establish here.

MR. : That is the basic rationale that's being used as a basis to defend the plan, similar to——

THE CHAIRMAN: Then the thinking is to retain the
68 old, historic Senatorial Districts with two and five added to——

MR. : No, not two and five, but to increase. And how they would do that would depend upon its Legislature, I assume, what each county——

MR. : Actually when we say at large we are getting away from geographical boundaries.

THE CHAIRMAN: Only in the counties—the counties, that is where we retain them. Not in the inter-county sense.

MR. : No. not in the inter-county sense. So I think they should be Senatorial Districts.

THE CHAIRMAN: Geographic——

MR. : Inter-county geographic Senatorial Districts.

MR. SCHMITTINGER: Well, I would like to call for a vote on that motion.

THE CHAIRMAN: What is your present motion? Do you want to amend it?

MR. SCHMITTINGER: You mean by adding seven, making it up to seven?

THE CHAIRMAN: Yes.

MR. SCHMITTINGER: Well, the present motion as seconded by Mr. Hartnett was that the geographic basis in the Upper House be the three counties as presently constituted.

69 Then I have said before with equal representation from each county. Now we can actually spell it out and say seven Senators from each county.

THE CHAIRMAN: Do you want to amend the motion, and as part of that motion you intend to retain in New Castle County the present historic inter-county Senatorial Districts——

MR. SCHMITTINGER: Well, I do, but I think that that would be a separate motion.

THE CHAIRMAN: Oh, very well.

MR. SCHMITTINGER: You make it, then.

MR. POPPITI: Well, let's put this one first.

THE CHAIRMAN: Is there a second to that motion as it has been amended?

MR. HARTNETT: Yes, I second it.

THE CHAIRMAN: All right, any further discussion?

Are you ready for the question?

All those in favor signify by raising their hand.

Unanimous.

Now, let's go to New Castle County.

MR. POPPITI: I move, so far as New Castle County is concerned, that the present Senatorial Districts be preserved.

MR. SCHMITTINGER: I will second the motion.

THE CHAIRMAN: Any discussion, gentlemen?

MR. : Yes. I am inquiring now for my own

70 edification. As I understand, the present seven Senatorial Districts, does anybody know whether they are roughly land areawise reconstituted in approximate land area?

MR. SCHMITTINGER: Well, I can tell you——

MR. POPPITI: You have two in Wilmington, and five outside of Wilmington. You have ten hundreds outside of Wilmington, and they embrace either one or part of an-

other hundred, or two hundreds. This would seem to have been the unit of measure used.

MR. SCHMITTINGER: That is right.

MR. POPPITI: Jesse Watson, for example, represents, his Senatorial District is Appoquinimink and Blackbird.

Cal McCullough has part of Christiana and New Castle.

MR. : Meg Manning has Mill Creek and part of White Clay Creek.

MR. : Jerry's question was directed to whether they contain roughly the same amount of land area. And this discussion I don't think is on the point.

I don't know, but looking at the map, it depends upon what you mean by roughly, I would say the largest area seems to be the Appoquinimink-Blackbird.

MR. : Which one are those?

MR. : The last ones, on the bottom of your
71 map, 14 and 15.

MR. : That seems to contain the largest geographic area.

THE CHAIRMAN: Let me mark these out and, then we can take a look at them.

(Discussion about map areas not transcribed.)

MR. HARTNETT: I think it is obviously are not.

MR. : The answer is, no.

MR. : Well, what happens to my affirmation of your criteria that we consider the Senate only on a geographical basis?

MR. POPPITI: Well, we are not geographical in the sense of area, land area. Geographical in the sense of trying to represent subdivisions of the county, which is what they apparently did. They combined these hundreds and parts of hundreds.

MR. : My problem is what we originally agreed upon, that second thing that Frank brought up. He went

very specifically and expressly into what the sense of this group was with respect to the word, "geographic."

MR. POPPITI: Well, we have done this.

MR. SCHMITTINGER: We have just defined it as these three counties, as presently constituted.

72 MR. POPPITI: Sure. We have just done that.

MR. : Well, are you telling me that the constitution of the Senate, where you preserve the Senatorial Districts as they are now comprised in the County of New Castle, is on a geographic basis?

MR. POPPITI: Yes, yes.

MR. O'DONNELL: That is not population. They represent areas.

MR. POPPITI: They represent areas.

MR. : All right, the difficulty we have getting over the hurdle of population is not, is entitled to equal protection of the law, under the Baker-Carr Case, is a disproportionate amount of representation.

To get back to a very fundamental point, and that is, whether one house may be on a geographical basis if the other house is on a purely population basis. And this is the Federal system.

(Unintelligible overlap of remarks.)

THE CHAIRMAN: And when you speak of the Federal system, look at Delaware and New York.

MR. POPPITI: That is right. What the heck, we have got two Senators, and so have they.

MR. : Well, I have no problem when you
73 get to New Castle County equals seven.

THE CHAIRMAN: But when you get inside New Castle County, you become concerned.

MR. : Because you are no longer applying the Federal rule.

MR. POPPITI: We are, too.

MR. O'DONNELL: We are precisely. Look at it.

MR. POPPITI: I come from Wilmington, which is my primary concern, but you have to recognize that areas like Blackbird and Appoquinimink, which are largely rural, farm communities, have got to have a voice in this government someplace which will give them an opportunity to be able to compete with the heavier voice which we presumably will have in the other branch of the Legislature. And I think this is what they tried to achieve when they laid out the Senate along these lines.

THE CHAIRMAN: Looking at the map, and keeping the Federal system in mind, looking at your map only on inter-New Castle County, let's assume that No. 1 represents a Senatorial District which is Delaware, as far as size is concerned. Or let's put it another way. Yes, No. 1 represents Delaware as a small geographical area, and that No. 6, which includes 11, 12, and 13——

MR. : Well, let me say this. You regard each Senatorial District, then, as the unit of comparability to the Federal system, rather than each county being the unit of comparability?

74

MR. : No, sir. (Unintelligible overlap of remarks.)

THE CHAIRMAN: Also when you speak of the State it is the county that is the unit. When you speak of the county it is the Senatorial District which is the unit which you are comparing.

MR. O'DONNELL: And in light of the Federal system, the Senatorial units, while they are based on geography, do not contain the precise same amount of geography, but they are based on geography, such as Delaware versus Texas is based on geography, and it is historic.

MR. POPPITI: Yes, that is right.

MR. KAVANAUGH: The two Senators from Delaware and the two Senators from New York are not elected by U. S. Senatorial Districts within the state. Now, this is where I say we have departed from the Federal concept. Because the minute you say that New Castle County is two units,

rural New Castle and the City of Wilmington, you are not following the Federal concept of Senatorial representation from the various districts.

MR. POPPITI: We haven't been saying that, Jerry.

THE CHAIRMAN: We are giving everybody seven.

75 MR. KAVANAUGH: But you are not very consistent.

MR. JOHNSON: You want seven for Wilmington, I think.

MR. : At least. (Laughter.)

MR. POPPITI: We can't make a pure analogy to the Federal system, but it is the basis from which—it is the point of departure. Then we have got to try to apply that to Delaware.

I keep hitting back at the practical aspect. We have got to try to evolve a plan which is going to be palatable to all these people, because there is going to be a giving up of power and giving up of certain privileges by each segment of the population here.

MR. : Well, let me not delay the discussion here any further. Where are we now?

THE CHAIRMAN: Well, we are on inter-New Castle County.

MR. SCHMITTINGER: Mr. Poppiti made the motion with respect to New Castle County, that the present Senatorial Districts be preserved, and I seconded it.

THE CHAIRMAN: Did he use the word, "historic?"

MR. SCHMITTINGER: Where was that?

MR. POPPITI: That the present historic Senatorial Districts be preserved.

MR. : You realize, Mike, we are giving up something there.

76 MR. : Because by the time this is through we are going to have 30,000 more in the five counties surrounding Wilmington, but we are not saying anything about Wilmington, too. We have got 58,000 in Brandywine Hundred, and our Christiana District has 20, so we are——

MR. POPPITI: Of course we are optimistic, too. We are hoping there will be some rejuvenation in Wilmington in our population.

MR. KAVANAUGH: But that is not the basis on which we are doing——

MR. POPPITI: Oh, no, we are just talking here.

THE CHAIRMAN: We are not dealing with Wilmington, per se.

MR. : We are not dealing with people, either.

MR. : No. we are not dealing with people.

MR. SCHMITTINGER: The question.

THE CHAIRMAN: Any further discussion? (No response.) If not, all those in favor of the motion signify by raising their hand.

It is unanimous.

MR. SCHMITTINGER: I would think that logically you would want to treat how the two new Senators in each of
77 the lower counties would be handled, but I would suggest that this time we defer that. I think we could have a much more fruitful discussion if we go on to the House.

MR. E. S. WILSON: Let me say one more thing. Can we go this step, or not? Can we go to the step that the two new Senators for each of the counties be allocated on a re-subdivision of the Senatorial Districts from five to seven, geographical Senatorial Districts?

MR. HARTNETT: I don't know whether I want to go along with that.

MR. SCHMITTINGER: Here is one aspect of that. We have got two weeks, Frank? Are we going to try to redistrict the whole county in two weeks? It just is not——

THE CHAIRMAN: No, but I mean as a matter of principle. Do you think the plan ought to conceive that it should be executed in this manner?

MR. SCHMITTINGER: We accept it as a matter of principle, that the bill that is drawn up would have that to say.

THE CHAIRMAN: Well, then, let's put it on record as a matter of principle, without giving the specifics. That is all I am saying.

MR. HARTNETT: I don't want to vote for that as a matter of principle at the present time I am not sure
78 that I don't favor electing at large. I want to think about it.

MR. POPPITI: Well, you are not being pinned down——

MR. HARTNETT: This is true, but I don't see how we are going to redistrict Kent and Sussex Counties——

MR. SCHMITTINGER: Well, I don't want to get involved in that argument. I might be willing to say that as he suggested, the first five districts should get one, and the second five Representative Districts get the other, but I don't think any of us thought we were going to get as far as we have here tonight, and I don't think we have thought this thing through.

MR. HARTNETT: I think it is getting late, and I would like to hear some of the ideas on the House.

THE CHAIRMAN: All right, do you want to lay aside the question of how the allocation of the additional Senators in Kent and Sussex Counties shall be made?

MR. SCHMITTINGER: This might well be an area where you could appoint a committee—or, I guess we are automatically a committee. (Unintelligible overlap of remarks.)

That's what I suggest, that we just table this and go on to the House.

THE CHAIRMAN: Very well.

MR. : Well, I think it is a Wilmington
79 problem.

MR. SCHMITTINGER: Well, it has to fit in with the whole picture, you are right.

THE CHAIRMAN: Except that we have got to have a consistency here in order to have rationality. Isn't that right?

MR. : Yes.

MR. JOHNSON: In other words, New Castle and Wilmington won't have to do anything.

MR. : That is right.

MR. JOHNSON: Whereas we have a little problem down here.

MR. : You phrased it so nicely. (Laughter.)

THE CHAIRMAN: All right, let's start the discussion around the table with Mr. Poppiti with regard to the House.

MR. POPPITI: My feeling is that we should not come up with any plan that will take away any of the present representation, but rather that we should work out a quotient, or a figure, whatever that formula is, which would ensure that if a particular area achieves that certain figure it would be entitled to at least one Representative.

As I visualize it, suppose we took the unit as, say, 20,000. Certainly Brandywine Hundred, for example, they have 60,000, and instead of having one Representative, they would get three.

An area like, if we take the other end, like Blackbird Hundred, where they have 1,600 people, they would retain their one Representative, but they would know that eventually with the Shell complex, and all that sort of thing, if they ever grew as rapidly, or someday achieved maybe a 40,000 population, they would then have two Representatives.

This would give us flexibility, looking in the direction of the group that Jerry outlined, that we can expect maybe in the next 20 years.

MR. : Well, from a practical standpoint that probably would be the easiest thing to do, but it would increase the size of the House so that instead of having 35 we would have 55——

MR. SCHMITTINGER: It would depend upon the size of the quotient.

MR. : But I don't know that you could defend in the court a 20,000 against 1,600 figure.

MR. HARTNETT: In Idaho it was upheld, this very thing was upheld.

MR. : But it was not by the Federal Court, was it?

THE CHAIRMAN: What you would have to defend, if you have established Representative Districts, that each one of those should have minimum representation. This is what would have to be done.

81

MR. SCHMITTINGER: That's right.

THE CHAIRMAN: Regardless of population.

MR. : And again using your Federal argument that the 446,000 in Delaware are entitled to one Congressman at large, and the 13,000,000 in New York are entitled to 45.

MR. HARTNETT: Delaware wouldn't even be counted.

MR. SCHMITTINGER: Don't you think that another aspect——

MR. POPPITI: What was our last census?

MR. SCHMITTINGER: Four sixty.

MR. POPPITI: Four sixteen?

MR. SCHMITTINGER: No, no, no. Four forty-six.

MR. POPPITI: Suppose we used 20,000, what would we come up with?

MR. SCHMITTINGER: 22. 20,000 into 446 would be 22.

MR. POPPITI: No, but wait a second. If you used the 20,000 formula that I suggested, you would start with 35. Right?

(Unintelligible overlap of remarks about computation.)

MR. HARTNETT: Start with 10 for Kent, 10 for Sussex, and then the population of New Castle County, and see how much New Castle would be entitled to. Well, excuse me, you are right.

82

MR. POPPITI: You start with 35, and then go into the particular area——

MR. HARTNETT: You're right.

MR. POPPITI: Suppose you start with 35. What is the population of Brandywine Hundred?

MR. SCHMITTINGER: 58.

Mike, don't you have to consider whether a fraction of the 20 would entitle you to another vote? I mean a major fraction.

MR. : Major fraction.

MR. SCHMITTINGER: In other words, you can't have twenty thousand and one persons and have two Representatives. If you say a major fraction, it would be 30,000 before you got your two?

MR. POPPITI: Yes, something like that.

MR. : I thought I had that figured out based on 20,000 (Unintelligible overlap of remarks regarding computation.)

MR. SCHMITTINGER: Your second Representative District is 33,000 people. You would be adding one there.

Your 5th Representative District is 30,000.

MR. POPPITI: You would add one there.

83 MR. SCHMITTINGER: Your 6th is 58,000, so you would add two there. Right?

MR. : Yes. I don't think that is such a cock-eyed approach at that.

THE CHAIRMAN: What county are you starting with?

MR. SCHMITTINGER: New Castle. The 7th Representative District would be plus one.

The 10th would be plus one. And that's all.

MR. HARTNETT: That would be six additional.

MR. POPPITI: With six additional members you would wind up with 41. It is not so unwieldly at that. On 20,000.

MR. : Can we defend 20,000 against 1,600?

MR. SCHMITTINGER: Well, I think Mr. Wilson——

THE CHAIRMAN: You defend that on the basis of minimum representation.

MR. : Well, the approach in some of the states has been as to what is a reasonable number for a person to represent. And in the opinion of some of the experts

who have commented on this, 12 to 15,000 has been thought to be a reasonable number to have a legislator represent. I am inclined to agree with those experts. And I would think that while there may be some objection to having such a large House of Representatives, that a unit
84 such as 12,000 or 15,000 were more acceptable, I personally would

MR. HARTNETT: Let's see what would it be at 15,000.

MR. SCHMITTINGER: Don't you have that practical problem of just how large a House can we have?

MR. : You have to balance this.

MR. : You have got to defend it. You threw out a figure about an hour about 30,000 more people in Brandywine Hundred——

MR. KAVANAUGH: No. 30,000 more people by 1965 in the five counties surrounding—the five hundreds surrounding Wilmington. Christiana, White Clay, Mill Creek——

MR. POPPITI: We are working on a project now involving a thousand acres which we anticipate 10,000 houses just in one hundred. I've got a combine of contractors discussing that. That's a 10-year project. You figure four or five to the average home, and that's 100—no, 50,000 more people in one area.

MR. : Well, if your quotient, or figure of 12,000, or 15,000, is not high enough——

MR. HARTNETT: By 1970 it may have to be changed. This is 1960.

THE CHAIRMAN: That wouldn't be practical in New York, a 12 to 15,000 figure.

MR. : Today we received notice that the
85 plaintiffs in the litigation are going to take the position of Mr. Dolan, political scientist. I don't know what Mr. Dolan is going to say, because I haven't spoken to him. But I have read what other political scientists have said. And I believe that if this matter should go to trial now, that the political experts will tell the Court that 12 to 15,000 is a reasonable number.

Now, true, it will make our House of Representatives larger than most of us have ever thought of——

MR. POPPITI: Frank, I was going to say, what is Pennsylvania's House of Representatives? About 500, isn't it?

MR. : Well, the New Hampshire House is 400.

(Unintelligible overlap of remarks.)

THE CHAIRMAN: reasonable to have someone represent?

MR. SCHMITTINGER: Well, that depends upon the area, doesn't it, Frank?

(Unintelligible overlap of remarks.)

MR. POPPITI: I am talking about population.

MR. SCHMITTINGER: But the effectiveness of the Representative you are also talking about.

MR. : Well, certainly the area he has to travel.

86 MR. SCHMITTINGER: Right.

MR. O'DONNELL: In Alaska that might be great factor, but I would think our Delaware area is not such a large factor, and we are talking now about representation of people, purely people. And apparently the people who have studied this have concluded that the number which one legislator may effectively represent is somewhere in the area of 12 to 15,000. At least those whom I have read have so advocated. I have no idea what Mr. Dolan is going to say.

MR. POPPITI: You know, outside of Wilmington we have actually used the hundreds as a convenience as the area of representation, and we would like to keep those hundreds, since they are geographical areas.

Now, you in Kent and Sussex have lost your hundred lines, but we would like to keep our hundreds because it is historic.

MR. O'DONNELL: And they are logical divisions as worked out on the map, too.

MR. POPPITI: Yes.

MR. KAVANAUGH: But I don't see how we can defend 1,600 as against 30,000.

MR. : Because that hundred is being represented in the House of Representatives.

87 MR. SCHMITTINGER: You mean heretofore?

MR. POPPITI: Yes, heretofore.

MR. : But the Court is not going to say anything about that.

MR. O'DONNELL: I think it would have to be population——

MR. POPPITI: What would we come out with at 15,000?

MR. SCHMITTINGER: Or major fraction thereof?

MR. POPPITI: Yes.

MR. SCHMITTINGER: Well, your second you would add one.

MR. : Speaking just of New Castle, now?

MR. SCHMITTINGER: Yes. For your 5th you would add one. In your 6th you would add three. In your 7th you would add two. In the 8th you would add one. In the 10th you would add two. Right?

MR. POPPITI: Yes, you would add two, that is right.

MR. : Three, if you used a major fraction.

MR. : None in the lower counties.

MR. SCHMITTINGER: Well, the 10th District of Sussex might be entitled to one someday.

MR. POPPITI: You would have 10 as against 6. You are talking about 45.

MR. HARTNETT: That is what I have always thought of, as an actual 45.

88 MR. O'DONNELL: This would not be a maximum 45. This would be a present 45.

MR. POPPITI: Yes.

MR. SCHMITTINGER: Except that we could write into this law that each census this would be reviewed by some formula, and maybe the 15 would be raised to 18——

MR. HARTNETT: Yes, I don't think you are going to be able to stick to 15 forever, because we might end up with a completely unwieldly Legislature.

MR. O'DONNELL: If 15,000 is the correct number to be represented, then you have to make other arrangements to accommodate that.

MR. HARTNETT: Where would you put them all?

MR. O'DONNELL: Well, that gets to be a housing problem.

MR. HARTNETT: I think you get into much more than just a housing problem when you get into a huge house.

MR. : 10 more?

MR. HARTNETT: No, I think 10 is fine. I don't see anything wrong with 45.

MR. : Well, all we are talking about is New Castle County, isn't it?

MR. : Well, Kent would get one more.

MR. SCHMITTINGER: They have 17. You haven't got your major fraction.

89 MR. JOHNSON: They are not voters, most of them. But you would be entitled to another one——

MR. SCHMITTINGER: Based on 22,500.

MR. : What you would have to do is set the 45, and then say that is the limit. I mean from there on, that's what the Federal Government did. They said 445, or whatever the number was. After that then you have got to re-carve the districts.

MR. : I wouldn't agree with that.

MR. : You wouldn't agree?

MR. : No.

MR. SCHMITTINGER: We'd go right back to where we are now.

MR. POPPITI: I think it would be better to expand it.

MR. O'DONNELL: I don't think 45 is such a large number. I don't think 55 is too large.

MR. POPPITI: Of course, my thinking is—of course, I am cautious and practical at the same time. My thinking is

in terms of what I think we can "sell." If we take this major step, if we change the thinking within the State, then perhaps this thing will be looked at, maybe in another 10 years, and maybe we will get closer to what is the ultimate to be desired.

90 MR. KAVANAUGH: I might be more liberal if I was sure you were going to recommend the constitutional convention, and then it would be reviewed at the constitutional convention.

MR. POPPITI: Yes, this, I think, is the ultimate to be desired, a constitutional convention.

MR. KAVANAUGH: Because I think there are a lot of causes for a constitutional convention.

MR. POPPITI: There are other areas of our government that have to be reexamined.

MR. O'DONNELL: I can assure you tonight or any other night will vote in favor of that, as I did at the last meeting. I indicated that, and I hope that tonight we will get around to that point, without regard to how far get with the progress we are now making. Because I think that would be a very substantial step forward, if this group would indicate its desire to have a constitutional convention.

Because, after all, it is 55 years old.

MR. POPPITI: Right.

MR. O'DONNELL: There are a lot of creaks and cracks in it.

MR. POPPITI: No question about that.

MR. O'DONNELL: I hope the meeting will not break up tonight without having a vote on that.

91 Now, getting back to this, I think that if a Representative is really to represent the people in his area, the number of people which he represents cannot be too large. And if it means enlarging the statehouse, that will have to be done just like we have had to enlarge the high schools to accommodate whatever number of people we have.

Now, to my mind the question is whether 15 is too much. Maybe 12 is the proper number.

MR. HARTNETT: I think 15 is the best we could for now. I think that selling them on 45 members would not be unreasonable, that the bounds wouldn't be too far off, and I think you could justify it. 12 is the absolute optimum, but 15,000 would not be too far off.

MR. O'DONNELL: No, it isn't. However, 15 is a considerable distance from 12 when you think how far 12 is from 1,600. It must be related to the smallest as well as to the total number, in my mind.

MR. HARTNETT: Well, I don't think that much difference between 1,600 and 15,000 and 1,600 and 12,000 would matter.

MR. KAVANAUGH: Well, one is maybe 6 times, and the other is——

MR. POPPITI: 7 times. That's the answer.

MR. KAVANAUGH: No, it is a little more than that.

92 And then when you talk about 15, here is Dover with 17, and you are not going to give it another Representative until it is 22,000. So it is really 16 and 22.

MR. : If you use 15.

MR. KAVANAUGH: Yes, if you use 15.

MR. O'DONNELL: If you use 12, you switch at 18.

MR. KAVANAUGH: Yes.

MR. SCHMITTINGER: Well, aren't we protected, Bill, by providing a formula for growth?

MR. KAVANAUGH: No, not as to the disparity between the smallest. You see, that is one of the things that worries me.

The Tennessee case highlighted the disparity between a big district and a small district. Now, the more we can reduce the disparity, the sounder ground we are on, in my view. Not only from a practical viewpoint, but from a legal viewpoint.

MR. POPPITI: Well, if you use 15 in an area that has got 16,000 people, before they get another representative they

have got to crowd themselves, whereas the area with 1,600, they could have a comfortable growth before they even attain the same status as the area that has a 15 or 16,000.

MR. : Yes, but it won't work that way.

MR. HARTNETT: If you are going to compare Black-
93 bird Hundred with Brandywine Hundred, you are never going to justify it on the basis of population. We are simply saying that Blackbird Hundred should have one because it is an historical unit, and each historical unit should have at least one. And I don't think you can say that 15 is an unreasonable number for a Representative to represent.

You are never going to justify a disparity between Brandywine Hundred and Blackbird Hundred on a population basis. You have got to justify it on the basis of an historical district.

MR. POPPITI: I was talking to a down-home legislator—a down-homer today legislator, and there is this to be considered: A man representing 1,600 in Blackbird Hundred has perhaps a harder time getting around his district than those of us who live in the urbanized areas of New Castle County where groups are a little closer, and it is a little easier to get around.

MR. KAVANAUGH: How many people are we talking about if we use 12 as the unit? Has anyone seen the figure on that?

MR. SCHMITTINGER: Well, we can figure that out.

MR. POPPITI: Let's see. On 20,000 we went up 6, and on 15 we went up 10, didn't we?

MR. : Yes.

MR. KAVANAUGH: You are going to do it with 12, then?

MR. SCHMITTINGER: Yes, all right.

94 MR. KAVANAUGH: And the major fraction would be 6,000?

MR. SCHMITTINGER: Yes. The 2nd District would be two additional.

MR. KAVANAUGH: Are you starting with New Castle?

MR. SCHMITTINGER: Yes. The 2nd District would be two new ones. The 3rd District one new one. 5th District would be two new ones. 6th District would be 4 new ones, 7th District would be 3 new ones, 8th District would be 1 new one, the 9th would be 1 new one, the 10th three new ones. That's all.

MR. POPPITI: Now, how many in the two lower Counties?

MR. KAVANAUGH: Kent would have——

MR. POPPITI: The 2nd District would have one.

MR. SCHMITTINGER: Yes, 2nd District 1.

MR. HARTNETT: That would have to be 18. Has it the 18 now?

MR. SCHMITTINGER: Yes.

MR. HARTNETT: That is the only one.

MR. POPPITI: How about Sussex County?

MR. JOHNSON: Sussex, no.

MR. POPPITI: No change. So it is still basically a New Castle change. What do you come up with?

MR. KAVANAUGH: 15.

MR. POPPITI: Ten, fifteen is what we come up with.

95 MR. : How are you going to sell that to the two lower Counties and not give them one person?

MR. : We will as soon as they cross the line.

MR. KAVANAUGH: We have given them two Senators.

MR. HARTNETT: I think we have a fighting chance to sell them on the basis of 15, forty-five in the General Assembly, with New Castle——

MR. POPPITI: Ten more. Giving us ten more.

MR. HARTNETT: 25. But when you get up to——

MR. POPPITI: You give us 10 more Representatives, and we give you 4 more Senators. We may as well talk practically. We are talking regions now.

MR. HARTNETT: Right.

MR. POPPITI: That will give you 4 more in the Senate——

MR. SCHMITTINGER: You people are just bursting with grief here, and we are now even close to——

MR. POPPITI: I know. We have an opportunity here to increase our representation——

(Unintelligible overlap of remarks.)

MR. SCHMITTINGER: The city boys are getting a principle accepted. That is what they are getting.

15,000 sounds right to me.

96 MR. HARTNETT: I think we would have a fighting chance of having that accepted by the members of the General Assembly, but I think if you go over that, we are on shaky ground.

MR. SCHMITTINGER: And when Dr. Dolan testifies, I am sure you are going to ask him how many offices he successfully ran for, aren't you, Frank?

MR. HARTNETT: If 12 is the optimum, 15,000 is not that far from 12.

MR. KAVANAUGH: Yes, but it is 22,000 when you are talking about 15, really. You are talking about 16 against 22.

MR. HARTNETT: Well, it's true, but we are giving them the major fraction. We could put it on the basis that you have to have another full 15 in order to have another Representative.

(The tape recording ended at this point in the meeting.)

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97 Sub-committee meeting held in the Treadway Inn, Dover, Delaware, on Tuesday evening, July 17, 1962, at 7:45 P.M.

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98 PROCEEDINGS

CHAIRMAN: Gentlemen, I guess we are ready to proceed. I was wondering, Mr. Schmittinger, if you have a text of those resolutions that were approved at the last meeting, which will give us a starting point from whence we can tee off tonight.

MR SCHMITTINGER: I don't think I can find them. I just received the record which Mr. Coote worked on over the

weekend to transcribe. But I think I can generally state what they were. Would that be satisfactory?

CHAIRMAN: That will be fair enough.

MR. SCHMITTINGER: I think the first resolution that was unanimously adopted was endorsing the principle of two houses. The second principle that was unanimously carried was that the Upper House, or Senate, be apportioned on a rational geographic basis. The third principle was that the geographic basis be the three counties, with seven Senators from each county, which was unanimously carried.

The fourth principle was on a motion by Mr. Poppiti that the present historic senatorial districts be preserved.

MR. O'DONNELL: That was with an exception.

MR. SCHMITTINGER: With the exception of New
99 Castle County.

The fifth principle was that the Lower House be apportioned on a general population basis as follows: the present 35 representative districts, as presently constituted, shall be entitled to a minimum of one representative. I'm sorry, that motion was never actually voted upon.

We started discussing the figure of 20,000, and 15,000, and we reserved decision on the actual number, the population quotient.

MR. WILSON: I think the whole thing was not approved.

MR. SCHMITTINGER: I just can't find it in the transcript.

CHAIRMAN: All right; suppose we start then on the assumption that as far as the House was concerned, we at least entered into preliminary discussion on the question of preserving the present historic representative districts, a preliminary discussion of whether each of those should have a minimum of one, and a preliminary discussion of the quotient which would reflect the right to increased representation on the part of the thickly populated representative districts.

Shall we tee off from there, or would you want to go back?

(At this point Senator Thomas L. Johnson made
100 his appearance.)

CHAIRMAN: Senator Johnson, we had just started and were reviewing what we had done at our last meeting.

Shall we go on with the House of Representatives?

MR. KAVANAUGH: If my memory serves me right, I think we did vote that the first order of business would be the Constitutional Convention.

CHAIRMAN: That's right. The Chair stands corrected. I will start the discussion tonight, as I did before, by having each one of us express our views generally with regard to whether we should or should not recommend a constitutional convention, and possibly, as an affiliate of that, our views on whether or not there should be some constitutional change which may expedite the holding of a constitutional convention short of three or three-and-a-half years.

I will call on Mr. Ernest Wilson first to express his general views on this important subject.

MR. ERNEST S. WILSON, SR.: I favor a constitutional convention and would suggest that we recommend the same to the parent committee.

As far as a speeding up device, I would welcome a constitutional convention sooner than it would normally take, but I am not sure in my own mind how we could do it,
101 not being a lawyer, other than the way I explained to you the other night, and, not being a lawyer, I am not sure that it is legal.

MR. JOHNSON: You've got a lawyer in the family.

MR. WILSON: Yes, but I can't consult him on this.

CHAIRMAN: Mr. Hartnett.

MR. HARTNETT: At the original meeting in the Governor's office, I was for a constitutional convention, and probably I surprised some people last week when I reversed that and spoke against it.

It is not something that I have not given a great deal of thought to. There is a certain amount of merit in hav-

ing a constitutional convention. I think it would be the way for Kent and Sussex counties to get zoning, which we have been unable to get so far out of the General Assembly. It will probably be the way for magistrate reform, which we haven't been able to get out of the General Assembly. I think a constitutional convention would probably strengthen the executive and weaken the legislative branch of our government.

But I think that a constitutional convention at the present time would jeopardize what we have done here so far. One of the reasons that I am not against a constitutional convention and for a constitutional amendment for re-apportionment, which could come about as early as January, is what I think was the remarkable progress that
102 we made at the first meeting. I did not conceive that we would get that far, and I think that we have already passed over the biggest hurdles on reapportionment. We have arrived tentatively at a composition for the Senate and a composition for the House. We haven't worked out the details but we have arrived at the broad plan, and though it may take a little time to work out the concrete details, I think the biggest stumbling blocks of the reapportionment have been passed.

Harold and I met with the members of the General Assembly from Kent County last night, and much to our surprise we found that they were on the whole inclined to view favorably the plan which we had tentatively arrived at at last week's meeting. There naturally were some that were not favorably impressed. There were a great many of them who came in with the idea that they were going to be against it, but after they heard about it, talked about it, and learned what the alternative would be, they seemed to be in favor of it.

They were in Kent County, I think, 100 per cent against a constitutional convention, and it wasn't due to my or Harold's mentioning it to them. As a matter of fact, we didn't mention the constitutional convention to them until

the end of the meeting. All we did was say that that was another alternative, and right away a couple of them jumped up and said, "We don't want that."

103 I think we are on the verge of getting this, what we have agreed on here, and I think if we can proceed very rapidly and draw up a concrete plan, with concrete language, that we have an excellent chance of having the General Assembly come in and pass the first leg of it, and coming back in January and finishing it.

Then I think maybe is the time to work on a constitutional convention, because by then the pressure for reapportionment, or the highly controversial issue of reapportionment, will be out of the way and they can concentrate on the other things which should be done if we are going to have an entirely new constitution.

I think if you go in there and say to them we recommend both, we are going to end up with a constitutional convention maybe, and I don't think we are going to get both. I think we are going to get one or the other. And if they did pass a call for a constitutional convention they would figure that would be just a way to pass the buck and forget about it. Then we would put the constitutional convention off until 1965.

I had serious question about whether we can shorten the time for a constitutional convention. I don't think the courts are going to let us wait until 1965 now. I must admit that my thought has changed a little bit on that. I think that if this plan that we have worked on were

104 to be passed in August, I think the court then would permit the General Assembly, at least until January or February, to finish the second leg of it, and I think then that that plan would have the strongest chance of standing up in court.

As I said last time, I am somewhat concerned about where downstate would be in a constitutional convention if the call for a constitutional convention is made now in the summer, in August, and it is an irrevocable act, and

in between now and the time the constitutional convention meets in 1965 the court orders reapportionment, or the court on its own initiative calls this reapportionment.

Of course, reapportionment means additional representatives for New Castle County, and I am quite concerned that this would, by implication, mean additional delegates to the constitutional convention for New Castle County. I think this is very unacceptable to Kent and Sussex counties, and I think that the Kent and Sussex County members of the General Assembly are just not going to buy it when they realize that this possibility exists.

I also think very strongly that it is the General Assembly which ought to do this because in the General Assembly today there are, you might say, four groups. There are the Democrats, the Republicans, the Upstaters and the Downstaters. No reapportionment constitutional amendment can pass the General Assembly without the
105 acquiescence of each of those four groups. The
1 Democrats can't do it alone; the Republicans have a veto. This, I think, will assure that the Republicans will have a fair shake in the reapportionment.

The downstaters can't pass it alone; they have to have the voters from upstate, and this assures that the plan must be acceptable and fair to upstate. And, of course, upstate can't pass it because they are in the minority, and the Republicans can't pass it because they are in the minority.

So each of these four major groups which I consider the four segments of the General Assembly has a veto over any reapportionment program, and this, I think, is going to cause a fair reapportionment plan, fair to everyone, fair to upstate, downstate, Republicans and Democrats.

In a constitutional convention the vote will be by a majority, and the majority party, whether it be Democrat or Republican, would control the constitutional convention and put through what type of reapportionment it de-

sired. If the Democrats controlled it, since the Democrats now control the General Assembly I think there is a possibility that the Democrats would control the convention, there is a danger that they would run roughshod over the rights of the Republicans and would reapportion in such a way as to be unfair to the Republicans.

106 Conversely, we don't know who will win the election of 1964. We know that there will be a gubernatorial election, and it could be a Republican or Democratic victory. I think that in that convention there is a great danger that the majority party would not give full consideration to the rights of the minority, especially if it were very one-sided. If there were a sweep in the state in 1964 and one political party overwhelmingly won the majority of delegates to the constitutional convention, then I think there would be a great danger that a reapportionment plan would come which would not be fair to the minority party.

As I say, now if this constitutional amendment is proposed in the General Assembly, all the four elements which comprise it will have their say and have the right to veto it if they think it is not fair.

I would like to point out that as I read the constitution very rapidly this afternoon, I can't find where it says there has to be a three-months' advertising in the paper for a constitutional convention. I may be wrong.

CHAIRMAN: No, that is an amendment.

MR. HARTNETT: That is definitely for amendment, and therefore the necessity of time is cricital now for a constitutional amendment. It must be done prior to August 6th, or 5th. They have to have time to have it advertised in the papers. It may be August 3rd.

107 MR. SCHMITTINGER: Three months before the election.

MR. O'DONNELL: You said for a convention?

MR. HARTNETT: For the constitutional amendment there has to be three months' notice. Therefore, I think we

should move as rapidly as we can to have the constitutional amendment enacted in time to be advertised so that the General Assembly will be in a position to pass upon a leg of it in January, and we should put off, since the question of a constitutional convention is not as crucial, since there is no deadline such as that three months' advertisement in the paper, we should put it off until we see if the General Assembly will pass this constitutional amendment.

If it should happen that the General Assembly would not pass the constitutional amendment, then we could try to do something on a constitutional convention.

I think that by recommending both you are going to lose one, and I'm afraid that the crucial thing to do is get this constitutional amendment through, because I think that is the one which is going to have the most appeal to the court rather than something which would take place in 1965. If we are going to have a constitutional convention, I think that the delegates to the constitutional convenion ought to be on a equal county basis, and that the constitution should be amended to provide that there
108 be an equal number of delegates from each county.

That's all I have to say.

CHAIRMAN: Senator Johnson.

MR. JOHNSON: I think that Mr. Hartnett has made a very eloquent speech opposing the constitutional amendment at this time. Personally, I have no objection to it, but inasmuch as this committee, I believe, was formed—the Governor's Committee was formed—largely because of the question of reapportionment at this time, it is very important that we get that question settled without confusing it with a constitutional convention.

We had our little meeting last night in Sussex County, and I don't know exactly what your impression was, Houston, but I got the impression that had we taken a vote the majority of the members of the legislature would have voted for a constitutional convention.

CHAIRMAN: Right.

MR. JOHNSON: But there were several there that indicated by facial expressions that they didn't favor it for some of the same reasons that Mr. Hartnett has stated.

We didn't put it to a vote and therefore we don't know, but my impression was that it would have carried. However, that would perhaps have caused some confusion in the Assembly when they go back, whereas there was absolutely no opposition to the reapportionment plan
109 as we had explained it to them, and they were almost 100 per cent in favor of asking the Governor to call a special session to act on this, although he is more or less obligated to do it regardless of what we recommend.

So that based on that, without going into the pros and cons of it, I would not suggest recommending a constitutional convention at this time but to go ahead with this reapportionment plan.

CHAIRMAN: Mr. O'Donnell.

MR. O'DONNELL: To the best of my knowledge, the constitutional provision with respect to advertising of many of the proposed constitutional amendments has not been followed. Does anyone know of a proposed amendment on reapportionment that has been advertised?

MR. HARTNETT: Not on reapportionment. That requires a two-thirds vote.

MR. O'DONNELL: That would mean that if the legislature should be called back now, you would just barely get it through.

I am not at all opposed to trying the legislative scheme. However, it seems to me to be wise to have two approaches. In the event the legislature should not adopt it, have the constitutional referendum on the ballot; and I believe that if the people in the state should clearly indicate that
110 they are ready for a constitutional convention as I think they are, it would be a good thing for the state of Delaware.

I have talked to quite a few members of the legislature, and I can't see the confusion which my colleague, Mr.

Hartnett, is concerned about. I think they clearly would understand the difference. At least if we should recommend to the committee both approaches, we would have two avenues open to us should the legislature buck on one or the other.

I would like to see us adopt a resolution recommending to the committee that two proposals be put to the General Assembly, one specific proposal on reapportionment and another proposal on a constitutional convention.

It seems to me that such an approach also might be more persuasive to the court in showing that Delaware is likely to get something done. Of course, that is only a matter of opinion.

So if the question is put, I would vote in favor of a dual approach to the problem.

CHAIRMAN: Mr. Kavanaugh.

MR. KAVANAUGH: I will be brief. I think I address myself generally to this overall question of what I would regard the purpose, function and scope of this subcommittee. Basically, it is the responsibility of this sub-committee to reach agreement on two separate pieces of legislation: one setting forth a plan of reapportionment of representation in the General Assembly of the state of Delaware; the second, a bill providing for a constitutional convention.

111

Like my colleague, Mr. O'Donnell, I favor advancing both fronts concurrently and simultaneously. I think it would be presumptuous of this sub-committee to leap over the parent group which sired this sub-committee and attempt to predict with any degree of certainty the legislative deliberations that will result in affirmatively passing legislation to accomplish these two ends.

I view the purpose again of this committee to be to report our recommendations on two specific pieces of legislation to the Governor's Committee of last June 28th, and this is to be done prior to or at least prior to the meeting of the parent group during the week of July 23rd which is upon us.

CHAIRMAN: Mr. Schmittinger.

MR. SCHMITTINGER: Mr. Chairman, I think when we all accepted appointment to this committee we did so with the implied pledge that we would come here not with our minds made up but would come here for a free and open discussion to try and arrive at what we thought was in the best interests of the state. I think that was implicit in our appointment, and I think when we accepted the appointment we agreed to this.

112 For that reason, I came here tonight not with my mind made up but prepared to listen to a discussion of what was in the best interests of the state. I am sure you all have the same concept.

I feel that we have got to keep in sight the purpose of this committee. As I understand it, this committee was formed as a reaction to a suit that was filed in the Federal court under the United States Constitution. That suit asked for reapportionment of the state. As I understand it, this committee was formed as—maybe I shouldn't say last hope, or last effort, but certainly very nearly—a last effort of the state of Delaware to come to grips with this problem of reapportionment.

The question of which method to follow in dealing with the question of reapportionment I think should be discussed in terms of reapportionment. Most of the arguments I have heard in favor of a constitutional convention are supported by reasons other than reapportionment of the state's population. I hear such arguments as: it will strengthen the executive; it will modernize our government, and so forth. These arguments lose sight of the purpose of our committee. Our committee is supposed to recommend a course of action to the parent committee which the Governor can support and which the legislature will enact, which will forestall the suit in the Federal courts.

113 The purpose of our committee is for the state of Delaware to somehow solve its own problem of

reapportionment rather than to have it solved by a three-judge Federal court. For this reason I think that the entire discussion of a constitutional convention should be in terms of the reapportionment problem.

I am perfectly anxious to listen to any argument in favor of a constitutional convention as that bears on the reapportionment problem, but if you gentlemen sit here and feel that this is the opportunity to modernize our government, this is the opportunity to strengthen the executive, then I think you are losing sight of what our specific purpose was, namely, to find some self-solution to this problem brought about by the Federal court suit.

Applying that to the instant question, I will say this, that we have reached agreement in principle on a constitutional amendment. If this amendment can be passed within the next week or two, as we all contemplate, it can then be made part of the constitution in January. We are talking about less than six months. Those advocates of reapportionment in Wilmington, and wherever they may be throughout the state—and there are many in the lower part of Delaware—would have the answer to their problem within six months. They would have their reapportionment. So it seems to me this is the quickest method
114 to pursue; this is the fastest method to pursue.

Also, it seems to me, if we introduce the constitutional amendment, we would be in a strong position to have the Federal court proceeding stayed. I think all the lawyers agreed to that last time, that we would be in a much stronger position than we are now.

If you pursue what has been referred to here as a dual approach, and also put in motion the mechanics of a constitutional convention, I don't think that will help our position before the court. I don't agree that they are two methods that can be followed at once. I think in a sense they are at cross purposes because what does a constitutional convention do? It does this. At the very moment when our amendment is being enacted into our constitution, or shortly thereafter, I should say, it wipes out the

constitution, it abolishes the constitution, and it says we will start all over and write a new constitution. So in that sense you are at cross purposes.

Secondly, there is no assurance that a constitutional convention, and I address myself now to the strong proponents of reapportionment, is going to more fairly reapportion the state. A constitutional convention is going to be composed of 24 lower Delawareans, I believe, and 17 New Castle Countians, some of them coming from rural areas. It could well be that they will come out with less than what we have now, or the same sort of thing that we have now, just juggled around a little bit.

So in the interests of those who favor reapportionment, if they sincerely believe in the principle which we have discussed here at our first meeting and which was, I believe, almost unanimously accepted, then they can best serve their interests by supporting the amendment approach and by not confusing the issue with the question of a constitutional convention.

The other point I want to mention in this regard is that many of the legislators recognize, I believe, as we here recognize, that this is a very difficult problem, and if we give them the alternative of throwing it open to a constitutional convention, that may well be what they will do. Why not ask them to come to grips with the problem as we have come to grips with it? If we are all satisfied with it I think we can convince our legislators.

So I would be against the dual approach, I believe, although my mind is not definitely made up, as I said earlier.

I will say finally that I think the strongest approach will probably be for us to recommend to the Governor's committee the following, that there be introduced into the General Assembly the constitutional amendment along the lines which we have discussed, and that if it is defeated then there be introduced a bill calling for a constitutional convention.

My reasoning there is simply this, that is, to help the state of Delaware solve its problem and not have a Federal court judge solve it. If we have the constitutional amendment, I believe Mr. O'Donnell and his brethren at the bar who are defending this case will be in a strong position at least to get a stay and allow the thing to go through next January.

If we don't get that amendment, if it is defeated, then the next thing we can give him, which in my opinion is the weakest thing, would be the call for the constitutional convention.

So I would suggest that we recommend the amendment, and if it fails that we recommend a call for a constitutional convention, keeping in mind that our purpose is to find a way out of this suit, and also keeping in mind that the discussion of a constitutional convention should be in terms of reapportionment and not any other benefits that people may think may be derived from a constitutional convention.

CHAIRMAN: I feel that Mr. Schmittinger's last proposal is subject to some comment, that the constitutional convention call be the alternative in the event a legislative-enacted reapportionment plan is defeated, and that
117 it would necessarily cause the legislators to consider passing the buck knowing that this alternative would come before them.

I don't want to see the legislators pass the buck. I personally feel, as far as our state is concerned, that three segments of our society are involved, or shall I say three arms of our government are involved. First, the judiciary is involved, and its duty and responsibility to see that the General Assembly of the State of Delaware is so constituted as to meet the standards and requirements laid down by the 14th Amendment of the Federal Constitution. This is their duty, this is their responsibility.

I conceive that in view of the urgency of the situation the first responsibility is to come up with a plan and to

formulate a plan which we hope will meet the test laid down by the 14th Amendment of the Federal Constitution. That duty naturally devolves and falls upon the General Assembly, and in one sense of the word we are acting as a proposing arm to that General Assembly.

But I feel rather deeply about this, that the entire citizenry of the state of Delaware is deeply involved in what will amount to a radical change from the historic in the legislative arm of their government, and certain it is that the legislative arm of the people's government in a republican form of government such as this should speak most clearly the will of the people.

118 This issue was not squarely before the people at the last general election, so in a very real sense of the word the legislature will be fumbling because, number one, the courts have not laid down any definite guidelines, and because this issue was never placed squarely before the people.

I feel deeply that we should not, and the legislature should not, deny to the citizenry of Delaware the privilege to exercise their power through their chosen delegates to a constitutional convention to review what this legislature and what the subsequent legislature may do with this particular problem.

In a very real sense of the word, we are grasping for a hurried solution. I would like to see a deliberate solution by a deliberative body. I think it is an important problem. I say deliberate in this sense, that when a constitutional convention is convened, I feel reasonably sure that the judicial process will by then have ground out some definite guidelines as to what should be the makeup of a representative General Assembly in a state such as ours. So they will in that sense of the word have more light than we have, or which our legislature now has.

In addition to that, a General Assembly, in my opinion, is primarily a political body. It is representative of political parties. It is made up of those people who

have aspired to political office, and presumably aspire to return to political office, at least in large measure. The delegates to a constitutional convention are there for one purpose, and that is to review the fundamental structure and makeup of their own government, and then they go home and they are no longer responsible to the citizenry who elected them, for purposes of re-election.

I think that a constitutional convention can operate in a much more deliberative manner from both of these points of view. I think the history of constitutional conventions has been that the caliber and quality of the thought processes are, by and large, superior to those of a "come today, go today" General Assembly.

So it is that I feel very deeply that the people of Delaware should be afforded an opportunity to speak to this issue and to speak squarely to the issue after their legislature has acted.

I think that as far as the members of the General Assembly are concerned, they should, and I feel that if properly approached they would, welcome a constitutional convention to review their handiwork, even though it may pass muster with the court.

I feel also that if the General Assembly should adopt a plan of reapportionment which we propose, or as they may modify it, if it should fall short of the mark established by such opinions of the courts throughout the United States, and in particular the Supreme Court, then this would afford the people through the delegates to the constitutional convention a second and a clearer shot at it, and I think that our courts would see that we are acting in the utmost of good faith in saying to the courts, "We propose and strongly recommend that in this moment of haste these corrections now be made by the General Assembly through a constitutional amendment in our legislative branch of government, and also we strongly recommend that the people of this state be af-

forded a chance to review what their General Assembly has done and to look at this problem as well as other problems which confront this state, constitution-wise, in a more deliberative atmosphere and with greater light upon the problems which confront us."

I think that perhaps Delaware has waited too long to face up to these problems. We are now squarely confronted with them, and from my sitting in with the representatives from Sussex County, and with Senator Johnson last night, I think I can say this. We didn't ask them to take a vote, to bind themselves, sitting in the Georgetown courthouse, as to what they would do. We explained fully and in great detail what we had done. We explained the fears which the member from Kent County had evinced at our last meeting with regard to what may happen
121 to Kent and Sussex County in a constitutional convention. We tried our best to leave nothing out.

MR. JOHNSON: That's correct.

CHAIRMAN: We were open to questions. We said we didn't want them to commit themselves because we felt that they should commit themselves only when they met together, but we wanted to get their feeling as to whether or not at least we were closely in tune with their thinking or if we were way out in left field.

The end result was that they gave us a unanimous vote of confidence, which is as far as we could expect them to go.

I do feel that if this is presented to at least the representatives from Sussex County and the representatives throughout the state, in this light, that they will face up squarely to these problems. I know that in Sussex County we are prone to be somewhat laissez-faire. If we are happy with the present situation we are prone not to change it. But I will say this for Sussex County: When it realizes that a problem must be solved, my experience has been that they come up with the right answer and solve it in a correct way.

I want to say this, that I feel that a constitutional convention, if it could be so held under an amendment as to divorce it from a political campaign, by holding
122 the election for the delegates the constitutional convention at a special election, separate and apart from a general election, this would have a tendency in my opinion to divorce it further from politics and place it upon a more statesmanlike level.

Finally, I feel that we should propose a constitutional convention because this was one of the purposes for which this committee was formed. I don't think that it ought to be in the alternative. I think it should be with the light that the legislature is required, under the urgency of the situation, to do something now, but at the same time the legislature should recognize that they have no clear mandate from the people of Delaware as to how this problem should be solved, and they should afford the people of Delaware the opportunity to review.

In talking to other gentlemen throughout the state, particularly in New Castle County and in Sussex County, there seems to be a momentum that is slowly gathering, and I will predict that it will snowball, that the people do want a constitutional convention and they want it now. And this present situation only highlights the need that this state has had for a constitutional convention for a considerable number of years last past, we not having reviewed our fundamental law for 65 years.

I will be glad to have any member of the com-
123 mittee get into a deep argument and discussion on this problem before I call for a vote.

MR. SCHMITTINGER: Mr. Wilson, how do you view that a constitutional convention will give us a better and quicker solution to the reapportionment problem?

CHAIRMAN: I don't say that it would give a quicker one, but I say that any work that I do here today in haste, any work which the legislature may do tomorrow, necessarily in haste, would so fundamentally affect the form and struc-

ture of the government that the people of the state of Delaware should and ought of right to be given the opportunity to make that review through the delegates whom they select for that purpose and for no other purpose, and not through a representative who may possibly have gotten me a road resurfaced in my district, or some other totally unaffiliated political issues that go into a political campaign.

MR. SCHMITTINGER: Aren't we faced with a Federal court that is about to reapportion the state?

CHAIRMAN: Yes, but I am telling the Federal court that I am requiring of my legislature that they take immediate action. I am asking the Federal court to recognize that immediate action ofttimes is action in haste, but at the same time I am asking the people of the state to review this thing as soon and as fast as they can review it
124 through their chosen representatives whose sole responsibility will be to review it.

And I say that I feel that I could stand up before the Federal court, I could hold my head high, and I could say to those distinguished members of our bench that if the General Assembly does these things and if the people of Delaware call for a constitutional convention, gentlemen, you should give us, and give the people, a fair opportunity to put our own house in order, because here is evidence of good faith that we are about business as rapidly as we can go about it.

MR. SCHMITTINGER: Can I make two comemnts about that? Do you concede that the constitutional method is an indirect method of meeting the reapportionment problem?

CHAIRMAN: Will you say that again?

MR. SCHMITTINGER: Isn't the constitutional convention method of meeting the reapportionment problem an indirect method?

CHAIRMAN: No. I would say it is a direct method by the people, through their chosen representatives, to do that and to do nothing more.

MR. SCHMITTINGER: Aren't the legislators in fact saying, "We are not going to directly solve this problem by an amendment. What we are going to do is provide for the election of delegates to a convention and let them
125 decide it?"

CHAIRMAN: No. I am asking the legislature to wrestle with this problem in all haste, and to formulate and enact a constitutional amendment by the legislature which will meet the test of the 14th Amendment. But at the same time I am asking the legislature to say—and I think they should, as every legislator acting in good faith should—"This is such a fundamental change from the historic past that I feel that the people, as a body politic, have a right to have their say directly upon the problem, and the most direct say that the people can have upon this problem is through their chosen representatives in a constitutional convention."

MR. SCHMITTINGER: One thing that we encountered last night in Kent County was this. We had every member of the legislature there, and this is what we encountered. They said, if we vote for this next week we are going to have to run on that issue in this coming election. That was paramount in their minds.

So in effect, if the amendment is passed, every legislator running for office will have to run on that issue, will have to stand up and be counted. He will have to say, "Yes, I am going to vote for that amendment and make it law the first week in January," or, "No, I am not." And in this sense the people of the state of Delaware will
126 ratify what the legislators can do, next week.

CHAIRMAN: Let me say in response to that, once the legislative hand is committed by the first leg of a constitutional amendment, if you stop there you have frozen that plan as being the only plan that the people can consider. And I say that any plan that we come up with necessarily cannot under the circumstances be a judgment of Solomon. I say you can come closer to a judgment of

Solomon by having representatives to a constitutional convention elected by the people, where the people would know that those representatives could consider many different apportionment plans, and even consider the matter of redistricting.

I myself do not feel that this committee, in the time allotted to it, or I personally, even with the benefit and advantage of the knowledge and discussion of you gentlemen, would want to undertake the problem of redistricting this state from the historic past. But if the people delegate that broad power to the representatives that they send to a constitutional convention, then those people would have the power to consider what we have done, what the legislature has done, to consider other methods, other plans, on a far longer range.

MR. SCHMITTINGER: You assume again, Mr. Wilson, that the Feedral court is going to wait for all that to happen?

127 CHAIRMAN: I am saying that this will be stronger evidence of good faith on the part of Delaware; that when these attorneys go before the Federal court it can be shown that Delaware is on the move to put its house in order.

MR. SCHMITTINGER: Aren't there some constitutions that don't provide for reapportionment at all?

CHAIRMAN: Delaware, I think, is the only one.

MR. SCHMITTINGER: Aren't there some provisions that have been held unconstitutional?

CHAIRMAN: You mean automatic?

MR. SCHMITTINGER: Yes.

CHAIRMAN: No. As I recall, those cases where there was an inbuilt plan of reapportionment in the constitution, the attack was on the General Assembly for not following those cases.

MR. SCHMITTINGER: There are some states that don't provide for reapportionment.

CHAIRMAN: Delaware, I think, is about the only one.

MR. SCHMITTINGER: Mr. Wilson, what assurance will a three-judge Federal court have that a constitutional convention in 1965 will provide reapportionment?

CHAIRMAN: They can only be assured that we are moving forward in good faith. That is the only assurance I can give them. And that we are moving forward by having the legislature speak to this and by having the people, through their chosen representatives, speak to it.

128

MR. SCHMITTINGER: The constitutional convention method is the most indirect and the slowest method of obtaining the writing of a new constitution.

CHAIRMAN: I am saying both.

MR. SCHMITTINGER: When you say both, aren't you in effect saying that next January our legislators will enact the second half of this amendment, which will provide for reapportionment, and about the same time they are going to provide for the election of delegates to the convention which will wipe out the very constitution which they amended?

CHAIRMAN: No.

MR. SCHMITTINGER: Well, that is what it will do, won't it?

MR. HARTNETT: I think you are missing the point. If the General Assembly agrees to call a constitutional convention, then why in the world would they pass a constitutional amendment for reapportionment since the constitutional convention is going to do it for them. This is the easy way for them to get out of it. This is the way they don't have to go home and say, "I voted for reapportionment; I gave those dirty so-and-so's from New Castle County ten more representatives."

It's going to be so easy for them to say, "Let the constitutional convention do it," and if the constitutional convention is going to do it in 1965 why in the world would they vote for a constitutional amendment now? There is no need for it.

129

CHAIRMAN: Very simply. I will restate it.

The legislature will necessarily be told, as we all know they are, that they are directly under the hammer to do something now.

MR. HARTNETT: Now, not in 1965.

CHAIRMAN: Right now. So this has to do with the legislature having to, as of now, adopt what it must adopt in all haste, a plan which will meet the test of the 14th Amendment of the Constitution of the United States, for the reason that under the present provisions for constitutional conventions, we can't wait that long because there is grave fear that the court will act.

MR. HARTNETT: Just a few minutes ago you said that a constitutional convention would be enough to hold off the court.

CHAIRMAN: I never said anything like that.

MR. HARTNETT: I'm sorry.

CHAIRMAN: I said that we should propose both because there are three bodies politic involved: the court, which interprets the Constitution, the legislature, which is under the hammer, and the people. They must be heard.

130 MR. SCHMITTINGER: How is the court involved in this, Mr. Wilson?

CHAIRMAN: The court must determine whether or not the present constitutional provision of reapportionment, or any provision of reapportionment which is enacted by the General Assembly——

MR. SCHMITTINGER: You mean the Federal court?

CHAIRMAN: Exactly.

MR. SCHMITTINGER: Well, that is not going to be affected by the constitutional convention, the Federal court.

CHAIRMAN: Let me complete my answer to Mr. Hartnett's question. Going back, the legislature must necessarily be told that they must come up with a plan which will meet the test of the 14th Amendment, as declared by the Federal courts.

Number 2, I think the legislature should be told, and I feel that they will agree, that there is a third and now

silent party in interest in this structural change of our government, and that is the people of the state of Delaware, and they should not deny to the people of the state of Delaware their right to review that which the legislature has done, and to review it in cold isolation, and not have it reviewed by representatives who are chosen in the heat of political campaign, where many diverse interests
131 may affect their election. And I think that the legislature would welcome the opportunity of having the people, through chosen representatives in a constitutional convention, being delegates who will not again be up for reelection and will not be involved in the pit of a political campaign, review and say on behalf of the people what they think of the plan which has been adopted.

I think that this judgment must be passed on the plan by two arms of our government: the Federal courts and the people of this state, and I know of no better way for the people of this state to pass upon it than by a constitutional convention.

MR. SCHMITTINGER: I am certainly not here to advise the people from New Castle County, but it seems to me that their interests would dictate to them that they should be opposed to a dual proposition, because if two bills go in, number one, there is a very good likelihood that the legislators will defeat the amendment and just pass the buck to this constitutional convention, as Mr. Hartnett said, in which case the people, assuming the court will agree, will have to wait until 1965. For what? To get a meeting of 41 people, 24 of whom are Lower Delawareans, 17 of whom are from New Castle County, many of them rural.

It seems to me that the people from the upper part of the state who want reapportionment——
132 CHAIRMAN: I have never said that I assumed the Federal court will wait for a constitutional convention in 1965. I do not believe that the Federal court will wait for a constitutional convention in 1965. I have said that insofar as the Federal court is concerned, num-

ber one, the legislature must act now on a constitutional amendment for reapportionment, and this we should recommend.

Number two, I think that we should recommend that the people of this state have an opportunity to review it by a constitutional convention as soon as it can be called under the existing provisions of the constitution, or as it may be amended to expedite and speed it up.

These two strong recommendations, I think, ought to be sufficient, at least in my humble opinion, to commend themselves to the court as an evidence that Delaware is busily getting its house in order.

MR. SCHMITTINGER: Mr. Wilson, do I understand that you don't believe the Federal court would wait for a constitutional convention in 1965?

CHAIRMAN: I do. I feel very strongly that the Federal court will not wait until 1965 to get reapportionment done in Delaware.

MR. SCHMITTINGER: Doesn't that mean that the Federal court is going to decide the reapportionment issue, then?

133 CHAIRMAN: Unless in the interim the General Assembly comes up with a plan which meets the test of the 14th Amendment, and the court so says it has.

MR. SCHMITTINGER: If that is so, there is no point in having the convention.

CHAIRMAN: Oh, yes. I think the people ought to have an opportunity to say something about this.

MR. SCHMITTINGER: Won't the people have an opportunity when they elect the members of the legislature this fall?

CHAIRMAN: Not as precisely as they would when they elect delegates to the constitutional convention, because there are many facets to a political campaign.

MR. SCHMITTINGER: How can that be when the people who elect delegates don't even know what plan of reapportionment the delegates will enact? How can that be?

CHAIRMAN: I would certainly say that under a representative form of government, when you have elected a representative and given him power to reconstruct the fundamental form of your government, that that representative speaks fairly for you upon all questions of reorganization of your government, including reapportionment.

MR. SCHMITTINGER: Isn't that true of our representatives right now, who have the power to amend the constitution?

134 CHAIRMAN: Not with such clarity as it would where they are elected solely for that purpose and for no other. A member of the General Assembly is elected for many reasons, not for the sole reason of re-organizing the fundamental charter of our government.

MR. SCHMITTINGER: What would compel a delegate to a convention to enact a reapportionment plan?

MR. O'DONNELL: The Federal courts.

MR. SCHMITTINGER: Well, we've got that situation right now, and our legislators have the power right now.

MR. O'DONNELL: May I answer Mr. Schmittinger?

CHAIRMAN: Yes.

MR. O'DONNELL: I can only speak for those pepole in New Castle County that I have talked to, and for myself. All of the people who have been studying this problem are convinced that we are going to have reapportionment one way or another. So that it isn't a question of whether we in New Castle County are going to get more representation; it is how we are going to get it. We are convinced in our own mind that we are going to get it.

Now, we also believe that it is more in accordance with our form of government to have elected representatives of the people draft the constitutional amendment—I am using that in its broad sense, whether it be by con-

135 vention or by a regular amendment—than to have three men, or a Master appointed by the United States courts, to draft it.

We are convinced that we are going to get more representation. The United States Supreme Court has just about

said so, even though Delaware was not a party to the suit. We are convinced that we are going to do it, but we are also convinced that under our democratic form of government, the amendment—the division of our country in particular—should be done by some of us, some of our people, rather than by three Federal judges.

We are not at all worried about whether we are going to get this, but we want—some of us do, at least—our elected representatives to have some say in how it comes about.

Now, if we were taking a very narrow approach to this, we wouldn't be here tonight because should the election be at large I am convinced that all the members of the Senate, and all the members of the House, would be from northern New Castle County. Whether they would be Republicans or Democrats I do not know, but I am sure of where the total strength of the registered voters is.

But I don't think that is just, I don't think it is democratic, and I don't think it is fair. Consequently, I think that a strong case can be made to the Federal courts
136 that since it isn't just and it isn't fair to have all the representatives elected by the voters in northern New Castle County, that they should wait for the people, or the elected representatives of the people, to come up with a new scheme.

Consequently, I think that the people of New Castle County that I have spoken to are not worried about getting more representation at all. We are worried about having the court enter an order that would not be fair to the people of the state of Delaware, and which would be completely out of sympathy with our traditional method of enacting laws. We think that this is a matter for legislative enactment—again I am using that word broadly, whether it be in a constitutional convention or in the legislature—and not a matter for judicial order.

Consequently, we are in favor of doing everything possible to see that this amendment be adopted one way or

the other, and we believe that we should take, and this committee should recommend that both proposals be recommended to the overall committee, and that that committee should adopt the resolution recommending that two bills be introduced in the General Assembly, one for a constitutional convention and the other for redistricting, for an amendment to redistrict.

MR. SCHMITTINGER: I agree with everything you
137 say. I would like you to answer me this question;

Mr. O'Donnell. How can you meet the argument in the Federal court of the plaintiffs' attorney that by virtue of enacting the first leg of the amendment, and by virtue of starting the constitutional convention process into motion, that in effect what the legislature has done is to give an amendment which provides, we'll say, a reasonable reapportionment that is going to be taken away the very year after it is created, taken away in favor of who knows what. Who knows what the constitutional convention will do?

How do you meet that argument? How do you meet the argument that this isn't really a delaying tactic?

MR. O'DONNELL: I'll take those up in reverse order, if I may. I think the Federal court will have to assume the good faith of the people of the state of Delaware and their elected representatives. If we are not acting in good faith we are utter fools, because we are literally staring down the barrel of a Federal order, and if we do not act in good faith then our fate will be similar to that of the Wisconsin plan. There the governor vetoed it, and the court immediately appointed a master to draft a plan.

I think our people can understand this, and I think that our people do, and everyone I have spoken to really is approaching this thing in good faith in both parties. I think
it has been demonstrated by the members of this
138 commitee; I think it has been demonstrated by the members of the General Assembly who met with the Governor at the overall meeting.

I really haven't run into anyone whose good faith I question. Perhaps I am naive. But I believe that if some-

thing is done, that the court will have to believe, and will believe—after all, they are three Delawareans who have had experience with our processes before—that we are acting in good faith.

If I were a member of the court and our Assembly had adopted one leg, and our people had ordered a constitutional convention by referendum, I would believe they meant business. I really don't think that the court will believe that the people of the state of Delaware are toying with them.

MR. SCHMITTINGER: I perhaps didn't make myself clear. I am not talking about the members of the legislature not acting in good faith. I am talking about a situation where in 1965 the constitutional amendment which presumably our legislature will enact in January is wiped out, and 41 men are brought together to try to decide what is best.

MR. O'DONNELL: I think I see what you are driving at. If we should adopt a second leg in January of 1963, and then have a constitutional convention thereafter, you are worried about the possibility that the constitutional
139 convention might resort to a non-rational plan of representation in the General Assembly.

I would answer that by saying that the history of our conventions in the state of Delaware is that we have attracted, I think—of course, I wasn't around; I only know what I have read—outstanding men of the time, and that our constitutional convention today will adopt men who will be more conversant with this apportionment matter than we are, and they would certainly not be so foolish as to resort to a scheme that would be knocked down as fast as it is adopted.

We have to assume that they will know everything we know and a lot more, and in my mind, that they could not be so foolish as to adopt a scheme that would be unconstitutional, as we now know the United States Supreme Court has held schemes similar to ours to be.

Consequently, I think we just have to accept on good faith that any constitutional convention that might be

called would not take a step backward. I would hope that it would take long steps forward. And I think that the court will assume that it will be moving forward and not backward. You have to remember that they too will have a cannon aimed right at them if they should adopt a legislative scheme which was unconstitutional.

MR. ERNEST WILSON: I think that there is a far
140 greater chance of a constitutional convention coming up with the right answer than of our legislature coming up with it with a gun pointed right at them, in a very short period of time.

MR. HARTNETT: Last night most of the members of the General Assembly said they were the ones who would be running for members of the constitutional convention.

MR. KAVANAUGH: I think it makes sense. If you are going to pitch hay, I want two prongs in my fork.

MR. HARTNETT: I want to say one again: If you have two prongs, you are weakening both prongs. I think that is the danger. If you go down there with two plans, one a constitutional amendment, the other a constitutional convention, you are going to find some for the constitutional convention, some for the constitutional amendment, some for nothing, and you are weakening your chance to get anything. That's what really scares me most of all.

I would rather see us go down there, asking for the constitutional amendment. If it should happen that we not get it, then come back, because we have a little more time on the constitutional convention. It can be any time before election because there is not that three-month deadline. Then come back and say, "We couldn't get the constitutional amendment through, we will have to settle for the constitutional convention."

141 But I think that if we give them two alternatives we may well come up with nothing, which would be a tragedy.

MR. KAVANAUGH: First of all, I don't view it as an alternative in the sense of being "either or". I view it as a simultaneous and concurrent type of thing.

MR. HARTNETT: You do, but the members of the General Assembly are scared to death, as they stated last night, that if they vote for reapportionment of any kind that it is going to hurt them at the polls, because their opponents are going to say you should never have done that. And the easiest thing for them, as far as the November election is concerned, is to pass the buck to a constitutional convention.

MR. KAVANAUGH: I just want to make one comment. Our charge here is not to tell the legislature what we in our humble wisdom in two meetings have decided, but rather to refer to the parent group convened by the Governor, consisting of 32 representatives from the two major political parties, what in our considered judgment we believe to be a practical approach, a statesmanlike approach to this impending court decision, and a foreseeable long-range plan with respect to the future government of the state of Delaware.

MR. HARTNETT: At that original meeting we were
142 asked to bring back a plan. We were not given any mandate. We were not told we had to bring back a plan for a constitutional convention. We were asked to study the problem, bring back our recommendations as the best and most practical plan.

It was definitely stated by several people that we were to attempt to bring back a plan which we felt could be enacted.

MR. JOHNSON: This is something Mr. Roth had to say about it, and I am getting somewhat confused, and maybe a constitutional convention is the better way:

"It is the responsibility of this subcommittee to attempt to reach agreement on two separate pieces of legislation:

"1. A bill setting forth a plan for reapportionment of representation in the General Assembly of the state of Delaware." That is one job.

"2. A bill providing for a constitutional convention."

MR. HARTNETT: Well, there is a bill already.

MR. JOHNSON: (Reading) "It is my understanding that this sub-committee may select bills already introduced in the General Assembly, or may prepare new bills."

Since I have been hearing these arguments I am wondering if the constitutional convention didn't apply
143 solely to a reapportionment issue and not to anything else.

MR. SCHMITTINGER: But you can't call it that way.

MR. O'CONNELL: You can't limit it. It was certainly the motivating factor.

MR. JOHNSON: I am wondering if there isn't some feeling with some of the Governor's committee that here is a good chance to get a constitutional convention in Delaware, which is all right with me. I have no objection to it, but there are some very definite objections.

MR. HARTNETT: Some people want a constitutional convention regardless.

MR. JOHNSON: Which is the most important? My understanding of this is that we are to recommend a plan of reapportionment. First a bill and then, if that fails, the constitutional convention will certainly provide a plan.

MR. SCHMITTINGER: I would agree to that.

MR. HARTNETT: I have no objection to that. I say if the constitutional amendment fails, then certainly we've got to go to a constitutional convention because we've got to do something. As Frank said, we can't let the court do it.

MR. JOHNSON: I would like to know if the Governor's committee is interested in the constitutional convention besides the issue of reapportionment. What is your
144 thought about that, Mr. Chairman?

MR. HARTNETT: Frank and I were there; and this question of which, or either, was discussed quite at length. Of course, that committee that night could have gone on record as being in favor of a constitutional convention if it desired. My understanding was that the whole thing was thrown into our lap and we are to come back with a recommendation.

They have a right to reject our recommendation. We could recommend a constitutional convention and they could say they recommend against it, or vice versa.

MR. JOHNSON: This would be an easy way out. As it is stated here, we could recommend that a constitutional convention be held. That is an easy way out, but is that what they want?

MR. O'DONNELL: Mr. Chairman, may I ask Maurice a question?

If upon the recommendation of this group our parent group should recommend to the legislature that they attempt to enact the first leg of a constitutional amendment, and nothing is said about a constitutional convention, the members of the present General Assembly who wish to run for re-election will have the same question asked by their constituents as you have proposed if both questions are put forward.

145 It seems to me that certainly they may have to defend their vote, which I don't object to; I think they should be glad to do it. But in any case they will have to defend their vote. So the fact that they will have to defend their vote, and the fact that there is also a constitutional referendum question before them, seems to me not to change the picture one iota.

If they vote No on a constitutional amendment, it seems to me they are going to have to defend that vote and their opponent can certainly say, "This man, in my mind, showed very short vision; he didn't see the Supreme Court behind him." Whereas if they vote Yes, they can say, "Gentlemen, we believed that it was expedient for us to do so. We believe that it is more in line with our form of government for us to have done so than to have the court do it."

I would think that either way they are going to have to face up to the issue.

As I understand it, you are recommending that the constitutional convention issue not be submited but the two-legged amendment be submitted. So, if I follow you

through, then the present legislators are going to be put to that acid test which you seem to fear.

MR. HARTNETT: You misunderstand what I am saying.

I don't have any objection to the legislators going
146 out and defending their voting for this constitutional amendment, and I think they can, and they can defend it very well. What I am saying is that there are those among them who are fearful of defending their vote for the constitutional convention, and the easy way out for them is to merely vote for a constitutional convention and then they don't have to defend it.

I think they ought to defend it, I agree with you. But I think we perhaps are paving the way with temptations, and we are making it a little too easy for those who want the easy way out.

MR. O'DONNELL: You sharpened it up for me considerably now. Is it your opinion that if they have two proposals before them, they will vote Nay on the legislative amendment?

MR. HARTNETT: Yes.

MR. O'DONNELL: Whereas if they have just one they will vote Yes on it?

MR. HARTNETT: Precisely.

MR. KAVANAUGH: I think that is a non sequitur.

MR. HARTNETT: Don't you see, the easiest thing for the legislator to do—this is what they said to us last night. They said, "Where is the court order? We haven't been ordered to do anything. How are they going to enforce it?

How are they going to make us do it even if there
147 is a court order?"

They wanted to impeach the United States Supreme Court. They wanted to abolish the United States Supreme Court.

MR. JOHNSON: Some of our boys wanted to join with Maryland.

MR. HARTNETT: Right. The easiest way for them to pass the buck and not have to come out and stand up and be

counted and vote for reapportionment is to pass the constitutional amendment. I don't think we ought to do it because I don't think we ought to wait for 1965. I think if this reapportionment amendment is fair it ought to pass, and they ought to stand up and defend it.

MR. O'DONNELL: It is your opinion that if the legislative amendment alone is presented, that it will get the required two-thirds vote?

MR. HARTNETT: Yes.

MR. SCHMITTINGER: I think so. It will get the Lower Delaware support.

MR. HARTNETT: As I said, there are only two in Kent County who definitely said they would not vote for it. None of them would vote for a constitutional convention.

MR. SCHMITTINGER: Whether a constitutional convention will add to or detract from the constitutional amendment being passed, isn't that really an issue?

148 MR. KAVANAUGH: Suppose the two of them are put in? As I understand what you said previously, they will vote Nay on the amendment and Yea on a convention?

MR. HARTNETT: I think that is what they will do. They might vote Nay on both, then they will split. Once you give them two alternatives then you give, we'll say half of them, a chance to take the other alternative, and we need every vote we can get.

MR. O'DONNELL: You say that the reason they won't vote for reapportionment when they have a possibility of a constitutional amendment is because they are going to have to defend their vote at home. But if they do it alone, without the constitutional convention being there, they are going to have to defend it anyway. So I can't see why they would vote any differently.

MR. HARTNETT: We are saying here is the constitutional amendment, we've got to do it, let's do it—and they will do it. But when you give them two alternatives some of them are going to take one of the alternatives.

MR. O'DONNELL: If you are right in your conclusion, and you certainly might be, I really can't argue what would happen, but if you are right there are many men in that legislature who are quite capable of drafting the bill for the constitutional convention. If that is what they want to do, it matters not what we do because
149 if that is what they want to do they will have the bill there and they will do it.

MR. SCHMITTINGER: Which bill?

MR. O'DONNELL: The constitutional convention bill there, and they will adopt it. If that is what they want to vote Yes on, that is what they will do.

MR. HARTNETT: But I would hope that the prestige, and the unanimous action by this committee, and perhaps unanimous action by the Governor's committee, would have enough prestige to keep a sufficient number of them in line to vote for the constitutional amendment.

But if we recommend both, then it is difficult to say to one who is going to vote for one and not the other, you are not going along with what we have done. If a man doesn't go along with what we recommend, then I think you can say to him, this is a committee of eight Democrats and Republicans, it is ratified by the Committee of Sixteen who are the leaders of the party, and I think you can bring a prestige factor to it.

CHAIRMAN: Let me speak to this. There is something in what you have said, Mr. Hartnett, that I don't quite comprehend. You have said that the Kent County representatives have expressed a grave fear of a constitutional convention, per se, for the reason that they are fearful that the downstate margin is not sufficient to keep
150 the upstate representation from getting the bit in their teeth at a constitutional convention and running way with it.

MR. HARTNETT: That is only of their fears.

CHAIRMAN: Second, you have said that your delegation last night from the General Assembly made it very clear

to you that they would not vote for a constitutional convention. But yet here you are arguing that if they were given alternatives they would discard the two-legged amendment to the constitution and vote for a constitutional convention.

MR. HARTNETT: Maybe I made it too strong. I don't say they would vote for the constitutional amendment.

CHAIRMAN: It seems to me you are attempting to carry water on both shoulders.

MR. SCHMITTINGER: He said they may both be defeated.

MR. HARTNETT: The only thing I am saying is that you are diluting your vote for the constitutional amendment, and it may well be that both of them will be defeated, not that one is going to be passed over the other.

CHAIRMAN: If it is going to be presented to the legislature, necessarily so, the time factor involved in a constitutional convention in our opinion will not stay the hand of the Supreme Court from entering a decree.

151 MR. HARTNETT: Last night they wouldn't even believe, some of them, that anything had to be done.

CHAIRMAN: They will have to believe this. Sussex County believes this.

MR. JOHNSON: No question about it.

CHAIRMAN: Not only did Senator Johnson and I speak on this, but a couple of the senators themselves spoke to it, and Robert Tunnell, who had just come from a meeting that very afternoon of the defense attorneys, spoke to it. So this is clear and it can be made more clear if your representation does not now understand it.

So that when this is made clear, and this is understood, that they are squarely under the gun and that the constitutional convention in and of itself is not the answer, then it seems to me, and I subscribe to this, the viewpoint of the constitutional convention is merely this, that the people of the state of Delaware ought as of right to have the opportunity to select a constitutional convention which in itself will in a more deliberate fashion, in a more con-

sidered fashion, and with better judgment, more knowledge and more light, review that which the legislature has been compelled to do under the existing circumstances.

So I don't say that these are alternatives. I would never agree to submit them to the General Assembly as a choice.

Rather, I say that the one complements the other
152 under our system of government as I understand it.

MR. SCHMITTINGER: Mr. Chairman, may I ask a question for anyone to answer who cares to answer?

If the constitutional amendment which we worked out last week is fair and reasonable, which I think we all agreed to, and if it can be made part of our constitution in January, why do we need a constitutional convention?

CHAIRMAN: My answer to that is so that the people themselves, through chosen representatives, who are solely concerned with this problem and no other political problem at all, may have an opportunity to review our handiwork in the light of future developments, and in the light of greater knowledge. That is my answer; I have no further answer.

MR. KAVANAUGH: I would like to make one comment.

If I may coin a phrase, my father told me that people convinced against their will are of the same mind still. I don't think we are making any headway in changing anybody's mind or point of view.

MR. SCHMITTINGER: Maybe my mind will be changed with the answer to that question. I would like to hear other answers. I have heard Houston's.

MR. JOHNSON: I believe the gentlemen from Kent County are concerned not so much with what the people are going to do with this particular apportionment proposi-
153 tion. They are concerned with what the convention is going to do to other parts of the constitution, is that correct?

MR. HARTNETT: I am not, personally; the legislators are.

MR. JOHNSON: In other words, you would be willing to put this particular proposition as we recommend before

the constitutional convention. There isn't any other thing that they could do, in my opinion, except to adopt a plan similar to this. But what are they going to do with the rest of the constitution? I think that is what your legislators are concerned about.

MR. SCHMITTINGER: Yes.

MR. JOHNSON: And some of ours; not many. I believe our legislators more or less left it in our lap to go ahead and do what we thought best. Wasn't that your opinion, Houston?

CHAIRMAN: Yes.

MR. JOHNSON: They certainly gave us a vote of confidence, and I am not bound to that. I can see your point. It's a selfish point of view, but that's been the case right along. Otherwise we would have given New Castle County 20 representatives a long time ago.

MR. O'DONNELL: Mr. Chairman, if by chance both proposals should be submitted to the General Assembly, and if the people of the state are entirely satisfied with the first leg of the constitutional amendment which would have been adopted under my assumed state of facts, they can vote Nay to the referendum in November.

154

MR. SCHMITTINGER: Calling a convention?

MR. O'DONNELL: Yes. If they are entirely complacent and happy with our constitution as it would then stand with half an amendment, they are perfectly willing to vote Nay. So that it isn't at all certain that we will get a new constitution simply because the referendum is put on the ballot in November. First of all, the convention might meet and not adopt a new constitution, or—I have myself in reverse order here. The people might turn the referendum down, or if the referendum is approved, then the convention might never adopt a constitution. Or the constitutional convention might, and I think if we have a good plan very likely would, approve the plan that might have theretofore been adopted in the two-session legislature method.

So I don't think the two things are totally inconsistent, although they both certainly are working on the same idea. But once one leg is adopted there is a possibility at least that the constitutional convention would be turned down.

155 I don't think it would be but there certainly is that possibility. I think lots of people in the state of Delaware think we are long overdue.

MR. SCHMITTINGER: Frank, will you answer that question of mine? How will recommending the calling of a convention help passage of the amendment?

MR. O'DONNELL: I won't, necessarily, but I believe that if this committee adopts a resolution recommending both approaches, that we can honestly and fairly say to the court that Delaware is really attacking this problem and that we will have a solution to it in due course. We won't know which course of action we will take because we can't know about either until January, 1963, at the earliest, but it certainly will be evidence that we are endeavoring to clean our own house, and I think very strong evidence, if both proposals should be adopted.

CHAIRMAN: Gentlemen, let me ask you this. Has everyone gotten off their chest what they feel they should say, and has every question been asked that wants to be asked, and answered to the best of our ability?

If so, I am going to propose in the light of this discussion that we withhold any definitive action on the question of a constitutional convention so that all of us can have an opportunity to reflect upon it, and go to the next question that confronts us, and see how we make out on that and how closely we come to unanimity on this, and then come back to this.

156 We have had a pretty full and, I think, edifying discussion, and I think it is a very serious question. I think we all ought to reflect on it for a moment in the light of what has been said, and make up our mind, possibly at a later time, and go on to a discussion of the next problem.

MR. KAVANAUGH: I concur, with the hope that there will be unanimity.

CHAIRMAN: Yes. This is a very heavy responsibility of the Chairman to try to bring this about.

MR. JOHNSON: It's a problem. In other words, I don't think the lower counties are going along out of the goodness of their heart to give you ten or fifteen more representatives.

MR. HARTNETT: I have become so much enthused about the constitutional amendment that I don't want to see it jeopardized.

CHAIRMAN: Let's go on to the constitutional amendment, not for purposes of further discussion but for the purpose of taking definitive action later on.

We have before us for discussion the question of the House, and it is a two-pronged question. Number one, shall the present districts have a minimum of one? Number two, what is the population factor that shall be used to determine the number of representatives with the heavily populated districts you have?

157 Shall we approach the first question first, and that is, whether or not we shall retain in the present representative districts a minimum of one vote?

Of course, you realize this jumps over a rather obvious question: Shall we retain the present representative districts?

MR. HARTNETT: I thought we decided that we would retain the present representative districts.

MR. WILSON: We did not decide it.

CHAIRMAN: Mr. Secretary, what did we decide?

MR. SCHMITTINGER: I'll have to re-read that.

MR. O'DONNELL: I recall Mr. Wilson reserving this issue.

CHAIRMAN: Then I will back up one step further and say it is a three-pronged question. Do we want to go into the question of redistricting the state of Delaware when we come to determine the plan of apportionment for the House?

MR. WILSON: If you are looking to me first, I would be in favor of retaining the present districts, but I am also in favor of combining districts for the sake of reducing the adjustment of the population. We determined when we settled on the Senate that the Senate would be a geographical proposition and that the House would
158 be based on population. You can't properly apportion when you give one representative district with 1,600 the same as another district with 22,000. That is a ratio of about 14 to 1.

CHAIRMAN: What you are saying, then—perhaps I will paraphrase it in a more direct way—is that you are in favor of limited redistricting, in the sense of consolidated districting?

MR. WILSON: Yes, and still keep the district lines. I might refer to the court decision in the Tennessee case: "It leads to but one conclusion, namely, that the Tennessee reapportionment is a crazy quilt without a rational basis. As admitted, there is a wide disparity of voting strength between the large and the small counties. Some samples are. . . ." and then it goes on to give examples.

This is pointing out evidence of lack of proper apportionment, and if we adopt here a 14 to 1 ratio we are flying right in the face of a Supreme Court Justice's opinion of bad apportionment.

MR. O'DONNELL: That is a question of when one bad apple makes the barrel rotten. We would be moving in the right direction, as I study the figures; we would be curing almost all the present inequities and we would be providing for future growth. With 22,500, if we base it on 15,000, which I think is too large, but if it is
159 15,000 or a major fraction thereof, 22,501 would get you two.

MR. WILSON: Yes.

MR. O'DONNELL: So it would be about 1 to 10, roughly speaking. However, some of these smaller districts are composed of a lot of undeveloped geography, and I be-

lieve that some of that inequity might be removed sooner than I think.

And I wonder, so long as we have a good scheme, 1 to 15,000 people or major fraction thereof, if in our scheme we do have some exceptions whether that would invalidate the scheme? The court hasn't exactly said that. They have said in these other cases, you don't have any scheme, you are all balled up to begin with.

CHAIRMAN: No rational plan.

MR. O'DONNELL: That's right. If we have a rational plan, as each area grows it will get more and more. If Brandywine Hundred kept growing it would get an indefinite number. If we have a rational plan, a unit of 15,000, or 12,000, even if we have several districts in the state that had not reached that number but we still had a rational plan, I wonder whether the discrepancy would invalidate it.

I do not have the answer to that question; I just pose it. I don't think anyone really has the answer to it because the court hasn't spoken with respect to it.

But I do see your point, and I question whether
160 it really would invalidate it so long as we had an otherwise rational plan.

MR. WILSON: The only reply that I can make is that those districts that I am talking about have not grown in the last ten years.

CHAIRMAN: Let's get a first viewpoint on this; then we will get into the discussion.

Mr. Hartnett; this is on the question of redistricting either in the sense of changing existing boundary lines or in the sense of consolidating existing districts.

MR. HARTNETT: I think the key to it is whether we have a rational plan, and Mr. Wilson spoke at great length last time about that rational plan, and the Supreme Court said in the Tennessee case that there was no rational plan, that it was a crazy quilt.

I think that a plan of leaving the present district boundaries as they are and giving each district a minimum of

one, with additional representation as they reach the quotient, is a rational plan. This same type of rational plan has been upheld by the Idaho Supreme Court. In Idaho they have the same thing. Each representative district, no matter how small the population, is entitled to one, and then with a quotient, as you reach that quotient
161 you get another representative for that quotient. Therefore, there is some precedent for upholding it.

This does not mean, of course, that the United States Supreme Court is going to buy the Idaho Supreme Court decision, but at least it is something to cite; at least it is something to set forth as being something which has been upheld.

I think, along the practical viewpoint, we reach the same problem that we reached when we talked about the Senate. Are we going to take away two senators from one county? I think you cannot expect a member of the General Assembly to vote to abolish his own seat. They are not going to do it unless some court absolutely and positively says that they have to.

It may be that the Supreme Court five years, or ten years, or fifteen years from now will say that you can't have a representative district with a minimum of one unless you have a quotient of population there. But until the court says so, I think we should present a plan leaving the representative districts as they are, giving each representative district at least one, and then as they reach the quotient giving them an extra member. I think this is our only hope of getting it passed.

I can't conceive of the representative from Blackbird Hundred, or Appoquinimink Hundred, voting
162 to abolish his office by combining it.

To say that these districts haven't grown in the last ten years I don't think is pertinent because Kent County hadn't grown until the last ten years but since then it has doubled its population. But up until ten years ago the Kent County population had been extremely stable.

The population growth of Delaware, I think, is moving

south. I think New Castle County is no longer as attractive to industry as it was because maybe the prime industrial sites have been taken up, and you are going to find industry moving down into Kent, and after we become saturated, down into Sussex.

Also, many of the districts in Kent County are not that small. I would say the average size of a district in Kent County is somewhere in the area of five or ten thousand population. That is within the realm of being rational.

Therefore, I think our approach ought to be keeping the districts as they are, one representative for each district, and then adding such representatives as necessary to add for each quotient.

CHAIRMAN: Senator Johnson.

MR. JOHNSON: I was going to say that these comments by the judge on the Tennessee case were made based on present representation.

163 MR. WILSON: Yes.

MR. JOHNSON: That is crazy quilt. If that is corrected along the lines of the plan that we have suggested, he might not call it crazy quilt.

MR. WILSON: Except that we would still have greater disparity, as he has cited.

MR. JOHNSON: This is a New Castle County problem.

MR. O'DONNELL: Not entirely.

MR. HARTNETT: The greatest disparity is in New Castle County.

MR. O'DONNELL: In Sussex, in your 8th District, Senator, you are not much better than we are in our 15th, by 1,300 people; still you've got a problem there.

You've got a problem here in your 9th. Kent has problems along these lines in their 3rd, 4th, 6th, 9th and 10th.

That is one of the things I had in mind when I was advocating a small number, small quotient, to try to reduce the disparity.

MR. JOHNSON: You only have three districts under 5,000 in New Castle, and you have two at 5,000, and the rest are pretty well up there.

In other words, what would be your plan of consolidating? Say the 14th and 15th? The 12th and 13th?

164 MR. WILSON: The 11th, 12th, 13th, 14th and 15th.

MR. JOHNSON: From 12 down is where your problem exists.

MR. WILSON: Your 11th and 12th would give you 12,700, and the 13th, 14th and 15th would give you about 9,000.

MR. HARTNETT: Actually, New Castle County might lose more representation.

MR. JOHNSON: When you consolidate it on the basis of 15,000 you would only get one representative.

MR. HARTNETT: In five districts you get 15,000, in New Castle County.

MR. KAVANAUGH: With the permission of the Chair, I think your instructions were that we get first impressions and then come back.

CHAIRMAN: Yes, Senator, have you completed your statement?

MR. JOHNSON: Yes.

CHAIRMAN: Mr. O'Donnell.

MR. O'DONNELL: I think I have stated mine; I apologize.

CHAIRMAN: All right. Mr. Kavanaugh.

MR. KAVANAUGH: I would say this, that with a view to my conviction that I would recommend both the

165 amendment and the convention legislation, and mindful of the fact that we have pending legislation, and the court's responsibility in determining the issues presented to it, that it will look at the total picture and will not content itself with the equities in the lower branch or the equities in the upper branch, but rather will address itself to the equities in the total General Assembly, I would favor a rational plan which, along the lines of Mr. Wilson's calls for consolidation.

But I would add one further point, and that would be division within a representative district which is larger, population-wise, than the ideal figure that you get from

dividing the total number of representatives in the lower house into the current Federal census figure.

For example, if we determine that the lower house should have a maximum number of 35, and we divide that number into 446,292—if my memory is right—I think you get a quotient somewhere in the neighborhood of 12,271.

MR. WILSON: 12,700.

MR. O'DONNELL: 12,751.

MR. KAVANAUGH: So that addressing myself not only to consolidation but also division, in those areas where you would need to combine, consolidate representative districts to get to this ideal, and in other representative districts which in and of themselves today have a population
166 which is in excess of our ideal quotient, this type of rational plan appeals to me as a starting point for discussion.

My comment with respect to using any arbitrary quotient, whether it be 12,000, 15,000, 20,000, or any figure you might select, is that from the standpoint of determining whether we should add six to New Castle, ten to New Castle, sixteen to New Castle, one to Kent, or whatever it might come out to, in my view when the court looks at the total picture what it is going to come up with, since we have already determined that there is going to be an equal number in the upper house, what you have done by using such a quotient is to preserve the very balance of power which we regard today as inequitable, namely, if 20 per cent, or 23 per cent of the legislators today control, if the legislators of 23 per cent of the population control, then I think you are projecting that same inequity when all you do is add 4 to the Senate and 10 or 12 to the Lower House.

Those are my remarks.

CHAIRMAN: Mr. Schmittinger.

MR. SCHMITTINGER: I don't want to add anything except to say that we've got about a week to come up with a plan for a constitutional amendment, and if we are going

to recommend one. I think to talk in terms of redistricting, and subdividing, and determining ideal quotients, while in theory is very fine, perhaps, it isn't going to give us an answer in the time that we have got to get an answer.

I think that the present 35 Representative Districts by coincidence can be a reasonable solution when we use the quotient figure that we were talking about, and add representatives to the districts, in that, as has already been pointed out, the future growth of this state is in these areas where the population is not up to some of the areas in the northern part of the state.

CHAIRMAN: I don't want to add to much to this phase of the discussion but I want to subscribe to the view that we originally conceived to be our problem, and that is, number one, to devise a plan that will meet the test of the 14th Amendment, which must be rational on the one hand, and not invidious on the other; and two, we also must devise a plan which will be palatable to the General Assembly.

I can see from the second point of view many bugs in getting something that is palatable to the General Assembly when we toy with the established Representative Districts. I think that we should approach that with full knowledge that the General Assembly will not look upon that with a great amount of favor.

I also feel that if such radical changes are to be made in our legislative structure, from the point of view of redistricting, that this perhaps should be something that should come from a constitutional convention, if a plan can be devised here and now and adopted on a two-step basis which meets the test of the Federal Constitution.

Also, I just want to add one other thought, and that is that this idea, as a part of a rational plan of giving a minimum of one representative to a given established Representative District, is a part of the Federal system in the sense that every state, no matter how small its population

may be, is entitled to one representative in the Congress of the United States.

So from the point of view of rationality, to that extent at least, this lends credence to the rationale of a plan which we conceive giving a minimum of one representative to each of the established historic representative districts of this state.

Gentlemen, I don't want to cut off any further discussion. Would you like to discuss this further or would you like to proceed to the entertainment of a motion and action on the motion?

MR. KAVANAUGH: I think we ought to let the court reporter take a break.

CHAIRMAN: Very well. We'll take a ten-minute recess.

(Brief recess)

181 THE CHAIRMAN: Gentlemen, do I have any motions now with respect to redistricting, or retaining the Representative Districts with the minimum of one vote?

MR. SCHMITTINGER: Mr. Chairman, I move that the 35 Representative Districts as presently constituted be retained as the basis of the House, and that each Representative District be entitled to a minimum of one vote.

THE CHAIRMAN: Do I hear a second?

MR. JOHNSON: I will second the motion.

THE CHAIRMAN: Any further discussion?

MR. O'DONNELL: Yes. I think I am in general sympathy ther subdivided into Representative Districts for each multiple or major fraction thereof.

There is a very basic question. I am not thinking of having all the five or six, or whatever it may be, Representatives who would be representing Brandywine Hundred as it now exists, at large in Brandywine Hundred. I am thinking of having Brandywine Hundred divided into convenient Representative Districts for representation by a man or woman of that Representative District.

So that I would think that the large present districts would have to be subdivided.

MR. HARTNETT: I think we ought to take it one step at a time.

MR. SCHMITTINGER: My motion I would expect to be followed by a second and a third motion with reference to the division of this into precincts.

THE CHAIRMAN: The present motion is that insofar as the existing Representative Districts are concerned, each of them shall be entitled to a minimum of one Representative with one vote each.

183 MR. SCHMITTINGER: And I would state, just to clarify the matter, that I would then expect a second motion to discuss a quotient, and adding Representatives based on that.

THE CHAIRMAN: And that quotient would be applied with respect to how those adidtional districts would be entitled to additional Representatives.

MR. SCHMITTINGER: And the third motion would be with regard to the manner of breaking them down into precincts, whether the Legislature would do it, or the levy court or how it would be done.

THE CHAIRMAN: With that thought in mind, would that answer your problem, Mr. O'Donnell?

MR. O'DONNELL: Could we restate it? I may have misunderstood.

(The pending motion was read by the reporter.)

MR. O'DONNELL: That would not be satisfactory to me, just have one vote.

MR. HARTNETT: A minimum of one vote.

THE CHAIRMAN: With one vote?

MR. SCHMITTINGER: Yes.

THE CHAIRMAN: All right, having in mind, Mr. O'Donnell, what we are seeking, or what the mover is seeking——

MR. O'DONNELL: It is phraseology I have trouble

184 with there, not the intent.

THE CHAIRMAN: Would you want to attack the phraseology of it and come up with something that would suit you?

MR. KAVANAUGH: May I make a suggestion?

I think Frank is having the same problem I have, and that is whether the three parts are going to fit into a logical whole.

Again you get back to where I can buy Part A, and Part C, but I don't know what Part B is yet. Is there some other way we can approach this?

MR. SCHMITTINGER: That is understood, that after all three parts are in we would have to ratify all three parts. In fact, all of these proceedings are subject to that understanding.

MR. KAVANAUGH: Couldn't your motion embrace all of them?

THE CHAIRMAN: Well, if it can be done piecemeal, I would prefer it that way. If it cannot, then we will have to try something else. That is, if it is done piecemeal with a caveat reserved in each of us to revote on the whole. This is the way we have been proceeding.

MR. HARTNETT: I think it would keep our discussion within bounds if you would make it piecemeal as we
185 go along. That is the only reason for it. We can confine our discussion to one point, and then move on to the next point and the next point.

MR. SCHMITTINGER: Do you want to make an amendment to the motion, Frank?

THE CHAIRMAN: He is working one out on phraseology.

MR. O'DONNELL: Let me try this before I make a formal motion. I have not quite finished what I have in mind, but I will show you the course I am going on.

Be it resolved that a plan be adopted providing for one Representative from each of the present Representative Districts having less than 15,000 population, and that all present Representative Districts having a population of more than 15,000 shall be subdivided into additional Representative Districts——

MR. HARTNETT: Would you call it precincts? Because I don't think you can call it district. Because I don't think there can be more than 35 districts.

MR. O'DONNELL: Under my plan, no, there would be 45 districts at the moment. That is where you and I are falling apart—separated into 45 Representative Districts each of 15,000 population or major fraction thereof.

MR. SCHMITTINGER: Frank, does that mean there
186 would be 45 delegates to the constitutional convention?

MR. O'DONNELL: This hasn't anything to do with the delegates to the convention. This is on the 1960 Census as we worked it out last week. I have triple-checked our figures, and Mr. Wilson and I seem to get the same number.

MR. HARTNETT: Wait a minute. I don't think we are too far apart. I think our terminology is the difficulty.

My understanding of what we more or less had in mind last time was at least one representative from each of the 35 Representative Districts, and those Representative Districts which had more than 15,000 would get an additional with the motion, but it did not go quite far enough to suit me.

I am thinking along the lines of retaining—I had that in my notes last time. Excuse me a minute.

MR. KAVANAUGH: While you are looking, Frank, would Mr. Schmittinger give us an illustration of how this would work?

MR. SCHMITTINGER: Regardless of the population in each Representative District, that district would have one vote, one Representative. Then I presume this motion will be followed by another motion providing for a quotient which will add additional Representatives to the existing Districts based on population.

MR. O'DONNELL: I had in mind subdividing the
182 larger districts, and I thought that it would be proper to have a motion that all of the Representative Districts be retained except that any Representa-

tive District having more than a certain number be fur-representative for each quotient.

MR. O'DONNELL: That is right.

MR. HARTNETT: If a Representative District under this system would be entitled to four representatives, the Representative District would be broken down into precincts, and the person would run only from his precinct, but it would not be called a Representative District. It would still be the 5th Representative District from New Castle, but there would be five precincts within the Representative District.

MR. O'DONNELL: You may have been thinking about that, but I wasn't. I was thinking of a Representative representing an area designated as a Representative District.

187 MR. HARTNETT: Well, whether it is called a district or a precinct doesn't matter.

MR. O'DONNELL: It does under our composition in New Castle, because our Representative Districts, contrary to many of yours, are comprised of numerous election districts.

MR. HARTNETT: True. Ours are, too.

MR. O'DONNELL: I thought yours were——

MR. HARTNETT: I am using the word, precinct, because that appears nowhere in regard to the delegates.

MR. O'DONNELL: I think we should have as many Representative Districts as we have Representatives under the scheme, and it will keep growing as the population grows, and so will yours. This is a Congressional system.

THE CHAIRMAN: May I make a suggestion that we again go back to the piecemeal approach by saying that with regard to the House of Representatives, the plan to be adopted provided for one Representative from each of the present Representative Districts having less than the population quotient hereafter approved by this Committee, and stop right there?

MR HARTNETT: Under your system you will have to define the boundaries.

MR. O'DONNELL: Yes, as we have done in the past, positively.

188 THE CHAIRMAN: If you follow my thinking on this, this leaves open for discussion the quotient which is not yet resolved, and also how that quotient shall be applied to those districts where it is applicable. This would merely be with respect to the House of Representatives the plan provide for one Representative from each of the Representative Districts having less than the population quotient hereafter determined by this Committee.

MR. O'DONNELL: I would second that motion.

MR. HARTNETT: Would you repeat that?

THE CHAIRMAN: That with respect to the House of Representatives, the plan provide for one Representative from each of the present Representative Districts having less than the population quotient hereafter approved by this Committee.

MR. SCHMITTINGER: I will agree to that.

MR. HARTNETT: I will agree to that.

MR. KAVANAUGH: Could we add something to the word, "plan," the reapportionment plan?

THE CHAIRMAN: Yes, you can add that. With respect to the House of Representatives, the reapportionment plan provide for one Representative from each of the present Representative Districts having less than the population quotient hereafter approved by this Committee.

189 Does the seconder agree to that?

MR. JOHNSON: Yes.

MR. O'DONNELL: We all do.

THE CHAIRMAN: Any discussion?

MR. E. S. WILSON: I am afraid I am going to leave you, because I feel that aside from getting it through the State Legislature, you are ignoring the Federal Court that is hanging over our heads, and by having a plan that is roughly, be it 22,500, or 18,000, with a Representative District of 1,600, I think you are going to get slapped down by the Court.

MR. HARTNETT: Well, I would say in comment on Mr. Wilson's comment, that is probably an argument someone will make to the Court, and that is their privilege, but I don't think we can make that argument to the General Assembly, because I don't think the General Assembly would pass it.

MR. E. S. WILSON: Except one of our basic principles here was to meet, and devise a scheme which would be between the two. One was a Court decision, and one was passage by the State Legislature.

MR. HARTNETT: I think this will stand the test of the Court, but I can see where someone would argue differently, and that is their privilege, of course.

THE CHAIRMAN: Any further discussion?

190 MR. SCHMITTINGER: I think Mr. Wilson has made his position clear, and I would like to suggest that without any formal vote we just go on to the next phase of it, and possibly when the whole thing is worked out, he would find the whole plan acceptable, although he may not at this point.

THE CHAIRMAN: Well, I have this suggestion, that we have got to move along with some positive action on this thing. If, at the end of the whole plan, Mr. Wilson would then like to change his vote on this, he can have it changed on the record, and so can any of the rest of us.

MR. SCHMITTINGER: Right.

THE CHAIRMAN: So if there is no further discussion, are you ready for this particular question, which has to do with one facet of the plan for reapportionment?

All those in favor raise their right hand.

(For the motion: Houston Wilson, Thomas L. Johnson, Frank O'Donnell, Harold Schmittinger, and Maurice A. Hartnett, III.)

THE CHAIRMAN: All those opposed?

(Against the motion: Gerard P. Kavanaugh, and E. S. Wilson.)

THE CHAIRMAN: All right, shall we now attack the question of quotient? If so, I will start with Mr. Wilson.

191 MR. E. S. WILSON: We have talked about 15,000, and we have talked about 12,000. There is to my mind argument for both sides.

Frank has mentioned, and I concur, that the 12,000 would make the disparity between the smaller districts, if we use 12,000 and 18,000, that much less, but it is only a small amount less.

With our Hundreds growing so fast, we will soon get up to a 55-member Legislature, with a 12,000 quotient. And while I don't have any strong feelings for either the 12,000 or 15,000, I do favor the 15,000 slightly. But I would be agreeable, really, to either.

THE CHAIRMAN: Mr. Hartnett.

MR. HARTNETT: We seem to be going over the same ground we went over the last time, and I find myself about ready to make the same arguments I made the last time. I guess I am getting tired of saying the same things over again.

I am in favor of the 15,000 quotient. I don't think it is out of line.

Someone has said that some political scientist has said 12,000 is the ideal for a person to represent. I don't think 15,000 is that far removed from the ideal. I think 15,000 would give us a workable House.

192 I don't want to see the House get too large. We are going to have a housing problem in Dover, if it does.

I think we sat down last time and figured out the 15,000 quotient would give New Castle County 25 Representatives, and I feel that is fair.

I feel, as I said, I can support 15,000, and I think I can go down in Kent County and justify that support. If we get into 12,000, I think we are going to have a little difficulty getting that job done.

THE CHAIRMAN: Senator Johnson.

MR. JOHNSON: I would favor the 15,000 quotient.

THE CHAIRMAN: Mr. O'Donnell?

MR. O'DONNELL: I favor 12,000 for reasons I have heretofore stated. However, I would not resist a motion based upon 15,000.

THE CHAIRMAN: Mr. Kavanaugh.

MR. KAVANAUGH: If it is not inconsistent with my previous vote, I would go along with the 15,000 quotient.

THE CHAIRMAN: Mr. Schmittinger?

MR. SCHMITTINGER: I would support the 15,000 quotient, or major portion thereof, which we discussed last time. And I don't think there is anything to be added to that.

THE CHAIRMAN: I certainly will go along with the
193 15,000. However, I do want to say that at the meeting last night in Sussex County they did talk in terms of a round figure in the sense of a major fraction such as using 16,000, an even number, which would mean that 8,001 would be a major portion thereof and a figure easier to analyze.

Would this change it at all?

MR. KAVANAUGH: We can work it out quickly.

MR. HARTNETT: I have some reservations about the major fraction. I don't know at the moment.

THE CHAIRMAN: The major fraction here would be in terms of 501.

MR. HARTNETT: I have some question about whether the quotient ought to be 15,000, period, or if it should be 15,000 and a major fraction thereof.

THE CHAIRMAN: It is 15,000 or a major fraction thereof. That is what it would be understood?

MR. E. S. WILSON: Yes.

THE CHAIRMAN: In other words, under this quotient, as I understand our previous discussion, when you got to 22,501 it would be two Representatives.

MR. HARTNETT: Why should it be a quotient of 15,000 plus a major fraction?

THE CHAIRMAN: You wouldn't get your 10 addi-
194 tional for New Castle County unless you did that.

MR. O'DONNELL: That is right. And the basis for it is that you should not have to wait until you have exactly 15,000. 14,000 people should be entitled to representation, or 13,000. And it has to shift on something, so it is thought that a major fraction thereof would entitle the District to another Representative so the figure would be 22,501.

THE CHAIRMAN: Can we work out the number on a 16,000 quotient? Have you got your 1960 New Castle figures before you?

MR. O'DONNELL: Yes.

THE CHAIRMAN: Number 1 would be 1 additional. I am putting down totals now. If you had 16,000, you would have 2 for No. 2.

MR. O'DONNELL: Right.

THE CHAIRMAN: No. 3 would have 1. No. 4 would have 1. No. 5 would have 2. No. 4 would have 6. No. 7 would have 3. No. 8 would be 1. No. 9 would be 1. No. 10 would be 2?

MR. O'DONNELL: No. 10 would be 3 by 292 people.

THE CHAIRMAN: Yes, it would be 3.

MR. O'DONNELL: All the others would be 1.

THE CHAIRMAN: No. 11 would be 1, No. 12 would be 1, No. 13 would be 1, No. 14 would be 1, No. 15 would be 1. That is a total of 24.

195 MR. O'DONNELL: We would lose 1 vote.

MR. E. S. WILSON: And we would lose it in the District that is growing the fastest, No. 8.

MR. O'DONNELL: As a matter of principle, we are getting farther away.

MR. E. S. WILSON: You are moving farther away.

MR. SCHMITTINGER: What was the reason for the 16,000?

THE CHAIRMAN: Because on the major fraction it would be a round figure.

MR. KAVANAUGH: How about dropping down to 14?

MR. O'DONNELL: I would second that motion.

MR. HARTNETT: I think people think in terms of 5, 10, 15, 20.

MR. JOHNSON: We had one legislator a[illegible] for seventeen five, so you get all kinds of figures.

THE CHAIRMAN: I am sure we would have difficulty in our lower counties if we went down from what the report was. But if going up will reduce the 10 to 9, we will vote to go to 15,000.

Does somebody want to make the motion?

This has to do with the population quotient by which it shall be determined which of the Representative Districts shall have additional representation. The motion
196 would be 15,000 or a major fraction thereof.

MR. SCHMITTINGER: Well, it would not be additional, would it, because they have already won by virtue of your first motion.

THE CHAIRMAN: Yes.

MR. O'DONNELL: 22,501 would give you 2 Representatives.

MR. SCHMITTINGER: So you would say for each 15,000 population or major fraction thereof in excess of 15,000, the Representative District shall be entitled to——

MR. O'DONNELL: Shall be further subdivided.

THE CHAIRMAN: Well, we will get to the question of how it should be subdivided. Shall be allocated at this time. How it shall be allocated will be a third matter.

All right, then, this would be that an additional Representative under the apportionment plan for the House of Representatives shall be allocated for each additional 15,000 population or major portion thereof in excess of the original 15,000.

Does anybody want to make that motion?

MR. SCHMITTINGER: Well, I so move.

THE CHAIRMAN: Any second?

MR. JOHNSON: I will second the motion.

THE CHAIRMAN: Any further discussion?

197 MR. HARTNETT: One comment. I am against the major fraction—not at the present time. I think New Castle County ought to have 25, but I am against establishing that principle for the future. But I will vote for this motion.

THE CHAIRMAN: Any further comments?

If not, all those in favor raise their right hand.

MR. E. S. WILSON: If I am not conflicting with the first part of it.

THE CHAIRMAN: It is understood that you have a right to review the whole.

All right, it is unanimous.

Now we come to the question of how these additional Representatives to be allocated shall be allocated.

MR. O'DONNELL: As I understand, Mr. Hartnett's problem and mine is one of nomenclature.

MR. HARTNETT: Right.

MR. O'DONNELL: I think it would be inconsistent to have some people representing something they are going to call a precinct, and have others representing something you are going to call a Representative District.

MR. KAVANAUGH: You could use Representative District in the traditional historical concept, and reapportionment district in terms of the supernumeraries that are
198 going to be added to the Representative District.

MR. O'DONNELL: Oh, I don't think so. I think if you are going to divide it, it is going to be a Representative District no matter what you call it. And I think it is illogical to call it anything but a Representative District.

MR. KAVANAUGH: Then you are advocating the legislation specifically provide the metes and bounds for the division within a specific Representative District where there are 22,500 people, or plus?

MR. O'DONNELL: That is right, that each dicennial if a Representative District has grown to the extent that it is entitled to additional representation, it would have to be subdivided by metes and bounds just as in the Federal system.

MR. KAVANAUGH: But you would not subscribe to the principle of consolidation?

MR. SCHMITTINGER: Well, Frank, are you going to answer his question?

THE CHAIRMAN: That is his suggestion. Suppose we go along with the rest of the views.

MR. SCHMITTINGER: In the Federal system when a state is entitled to another Representative, the Representative is still part of the state, isn't he?

MR. O'DONNELL: Yes, he is, like from New York,
199 the First Congressional District, the Second Congressional District, and the Third Congressional District.

MR. SCHMITTINGER: Why wouldn't the new Representative still be part of the Representative District?

MR. O'DONNELL: Because it would be just exactly like Congressional Representatives. If the State gets 20 additional Representatives, it will have 20 additional Representative Districts. If Brandywine, in my mind, gets additional Representatives, they will have that many Representative Districts. They won't be one Representative District. They will be in Brandywine Hundred. Brandywine Hundred today is one Representative District. In the future it might be 5, or in the more distant future 8, or any other number.

MR. SCHMITTINGER: Well, you are proposing a separate entity. A newly-apportioned district would be a separate Representative District.

MR. O'DONNELL: Just like each one of your Representative Districts in a separate Representative District. We are not asking anything different from yours. Exactly like yours, and exactly like ours now. Each Representative has a Representative District, just as you do.

MR. HARTNETT: Who is going to set the boundaries?

MR. O'DONNELL: That is part of this overall pic-
200 ture that we have to decide.

Now, in order to have a good reapportionment statute we have to provide for the machinery for new boundaries to be set in the future. In most of the states, the reapportionment laws provide for the legislature to do it, and I intend to advocate that here.

MR. HARTNETT: By constitutional amendment, or by simple act?

MR. O'DONNELL: I would recommend that it be by simple act, every 10 years.

MR. HARTNETT: There is where your major fraction is going to make a tremendous difference, of course.

If you have Brandywine Hundred now as 58,000 entitled to 4, if you break it down into 5 Districts, then just as soon as those Districts reach an addition of 6,500——

MR. O'DONNELL: It would be entitled to another.

MR. HARTNETT: Each District might have a major fraction of the quotient, and therefore be entitled to 5 additional, whereas your total population in the County would not be entitled to it.

MR. E. S. WILSON: I agree with you in principle, Frank, but the question I raise is the difficulty of making the division quickly.

201 I would like to see us make the division mandatory for sometime in the future, and spell it out, maybe '64, or—I would hate to see us have to do it for '62.

MR. O'DONNELL: Well, you are abandoning a dicennial system?

MR. E. S. WILSON: Pardon?

MR. O'DONNELL: You would do it more frequently than every 10 years?

MR. E. S. WILSON: No; I think to start with we would do it, but give us time to organize to do it.

THE CHAIRMAN: Let a constitutional convention wrestle with it.

MR. E. S. WILSON: Let a constitutional convention do it. I am thinking of the chaos of doing it between now and November 6th.

MR. HARTNETT: Well, he wouldn't require it in this motion.

MR. O'DONNELL: No. We were talking about the future amendments to provide for additional population. How will that be done, not now, but how will it be done in 1970, the way I understand it.

MR. HARTNETT: Well, we have the problem for 1964. We would have to do it——

202 MR. O'DONNELL: Not in my mind, we don't.

MR. E. S. WILSON: I am in agreement with you that it should be Representative Districts in 1970.

MR. HARTNETT: What do you do about 1964?

MR. O'DONNELL: Nothing, because there is no Federal Census. These Federal Census figures will stand until 1970.

MR. HARTNETT: No, you don't understand. If the Legislature acts on this in August, and again in January, it will become effective for the election in 1964. And at that time New Castle County will be entitled to 10 additional Representatives. How are you going to set up your Representative Districts for 1964?

MR. O'DONNELL: As I envisage it, one of the last things we will come to tonight is how we will change in the future, and I was going to advocate that the apportionment of the State be reconsidered and the State be reapportioned every 10 years after the Federal Census.

The apportionment to be made now would be made on the 1960 Census.

MR. HARTNETT: By whom? Who would make the apportionment on the 1960 Census?

MR. O'DONNELL: If it is done by the two-legged approach, it would be done by the Legislature. If it is done——

203 MR. HARTNETT: You mean spelled out in this constitutional amendment?

MR. O'DONNELL: Yes.

MR. HARTNETT: This is why I think Mr. Wilson says this Committee hasn't time to do it.

MR. O'DONNELL: I wasn't thinking of this Committee doing it, either. It has to be incorporated into the plan, but I didn't think it was the function of this Committee to get down to that detail. I think our job is the broad scheme.

MR. HARTNETT: Who is going to draw the Bill, then?

MR. SCHMITTINGER: Don't we have to recommend the Bill?

MR. O'DONNELL: The details, or the principles of the Bill?

MR. HARTNETT: I thought the specific Bill in suitable form for presentation to the Governor's Committee.

MR. O'DONNELL: I envision us coming up with a general plan, and then if the overall Committee approves the general plan, we sit down and work out the geography within the districts, but it seems to me we would be putting a lot of water over the dam if we divide all of these districts, and then that Committee said, "No, we don't go along with your general plan."

I think we ought to report back with the general plan, and if they say, yes, they approve that general plan,
204 then we work out the geographical details.

They may say 20,000, and we would have spent hours dividing this on the basis of something they would not accept.

MR. HARTNETT: I think there is not enough time between now and our deadline, the first week in August, for anybody to come up with a specific boundary.

THE CHAIRMAN: May I speak to this? I have three reasons in my own mind why I would like to dissuade Frank from this approach.

Number one is the reason urged by the distinguished Mr. Wilson, that is, that it would create chaos, it seems to me, both in the parent committee and in the Legislature, to try to reformulate these districts to do some redistricting in New Castle County.

It would very possibly create enmity. It would misdirect the attention of the Legislature from the central problem and possibly send them off on a tangent with no result accomplished.

Number two, I think within the spirit of our previous discussion, which we have taken back to our Representatives at home, this was not a part of the concept, and in fact what you would be doing is taking, well, an apple tree which we presented as one apple tree with a prospective

growth which would entitle that apple tree to one
205 other apple, and dividing it and making five apple trees out of it so there would be five times the potential of that growth, and when that was recognized as one of the salient features of this plan, and once that was explained, it would be unacceptable to Kent and Sussex Counties.

So we would not be coming up with a practical plan that the Legislature would adopt.

Also, I think it would foment litigation as to what the effect of this would be upon the delegate strength of a constitutional convention if one were ever called. It would at least lead to extensive litigation on the question: Having created new Representative Districts, does that by direct inference affect the delegate strngth in a constitutional convntion? And if it is understood that there is this possibility, I think it would not be germane to the central issue, and we are not here to tamper with the provisions respecting delegate strength in a constitutional convention. We are here to deal with the reapportionment of the General Assembly.

These are my three reasons.

MR. O'DONNELL: Let me see if I understand.

You are advocating that the additional representation that might be given to the 58,000 people who reside
206 in Brandywine Hundred be elected at large within Brandywine Hundred?

THE CHAIRMAN: Yes, sir.

MR. HARTNETT: I do not agree with that.

MR. SCHMITTINGER: I do not necessarily agree with that.

MR. E. S. WILSON: I do for 1962.

THE CHAIRMAN: That is what I mean. I say that at some future date I am in thorough agreement that it should be separate Representative Districts.

MR. HARTNETT: What I had in mind was that Brandywine Hundred would be split into five precincts, and all approximately of equal size, approximately 15,000 people

in each precinct. There would be a Representative for each precinct, who would have to come from that precinct and be elected by the voters from that precinct.

The main reason I use the word, "precinct," is to get around this question: Are we increasing the Delegates to the constitutional convention?

And secondly, as I said before, if you break it down into five Districts, and give them another one every time you get a fraction of 15,000, you are multiplying the number of additional Representatives they would get, instead of adding them as you would be a major fraction of the total.

207 If we eliminate the major fraction, we wouldn't have that problem.

Secondly, I would say the General Assembly by statute, perhaps two-thirds majority, three-quarters majority, three-fifths, or something like that, would set the district, and that would take it out of our hands.

It would become germane after the constitutional amendment was approved. It would have to be done between then and '64.

THE CHAIRMAN: I would say that if we divided into precincts merely by calling it a precinct instead of a Representative District when in substance there would be a Representative from that District who would represent that District by whatever name it is called, I suspect that the Court would say that a rose by any other name is still as sweet, and is still a Representative District for purposes of the constitutional convention.

MR. HARTNETT: If you elected at large would you violate your principle of no Representative representing more than 15,000 people, which I thought was one of the big arguments which we were going to have to make, that 15,000 was not unreasonable?

THE CHAIRMAN: You would have three Representatives representing the people, not one.

208 MR. SCHMITTINGER: What would be your objection to electing by precinct?

THE CHAIRMAN: Electing by precincts, they would be thereby representing a precinct, and I say as a matter of substance the Court could well say that even though named a precinct, it is a Representative District, and that you cannot avoid the implication of a Representative District by calling it a precinct. It is a mere matter of semantics.

MR. SCHMITTINGER: What is the implication?

THE CHAIRMAN: That you are thereby increasing the strength of the Delegates to the constitutional convention.

MR. SCHMITTINGER: Would it be agreeable to provide also in our amendment that it be expressly understood that in no way is the Delegate strength to the constitutional convention as provided in our constitutional convention clause changed by this amendment?

MR. HARTNETT: I would be for that.

THE CHAIRMAN: That would be all right.

MR. SCHMITTINGER: Would you be willing to go along with that, Frank?

MR. KAVANAUGH: Would you restate that? My attention was distracted.

MR. O'DONNELL: I think if we do that, such a plan
209 would be certainly subject to attack in the courts, and be as unconstitutional as our present arrangement.

If our present arrangement is unconstitutional, then such an arrangement for a constitutional convention would also be unconstitutional.

We haven't been devoting much time here to the makeup of any future—well in the future constitutional convention. But I do believe if we have a constitutional convention it would have to be drafted in accordance with the law as announced in Baker vs. Carr. While it did not deal with constitutional conventions, certainly the principles are broad enough to apply to any representative body that might be representing the people of any state. So I think we would be just kidding ourselves in the first place. And in the second place I think we would be disenfranchising thousands of people.

So I would not go along with it, if you want to get into that.

MR. SCHMITTINGER: Isn't it true that the delegates to the Constitutional Convention of the United States were not based on population?

MR. O'DONNELL: Were not?

MR. SCHMITTINGER: Were not.

MR. O'DONNELL: That is right.

210 MR. HARTNETT: Are you saying now that if this goes through and New Castle County gets 25 Representatives, they will be entitled to 25 Delegates to the next constitutional convention?

MR. O'DONNELL: No, I didn't say that at all. But I am saying that if in the future a constitutional convention should be attacked, if it should be made up as presently provided, I think it would be unconstitutional.

THE CHAIRMAN: You say this next one would be running the risk of it?

MR. O'DONNELL: That is right.

MR. SCHMITTINGER: There are no cases with respect to Delegates to the convention.

MR. O'DONNELL: I realize that.

MR. HARTNETT: What you are saying is that you think there is a substantial question as to whether the next constitutional convention could get by without attack on the ground that it is not constituted in accordance with population?

MR. O'DONNELL: I am saying if it should be attacked, I think there is a good possibility that it might be held to be unconstitutional.

Now, that is pure conjecture on my part, because—

MR. HARTNETT: I know. I agree with you there is
211 a logical conclusion that follows from Baker vs. Carr.

MR. KAVANAUGH: Isn't there a foreseeable possibility, and wouldn't we be well advised to suggest legislation which would also include amending Section 2 in order to get over any possible constitutional attack?

MR. HARTNETT: Frank is of the opinion that we couldn't; that the next constitutional convention, it can be argued, will have to be on the basis of population.

MR. O'DONNELL: I don't think we reach that in this discussion we are having.

MR. E. S. WILSON: You are looking under the bed for a ghost.

THE CHAIRMAN: How about this suggestion to amend that provision of the constitution relating to conventions so as to provide that the Delegate strength of each county be determined by the number of counties and Representatives in the General Assembly from that county?

MR. KAVANAUGH: Do we need to qualify that further by relating it to a particular time, time of the convention?

THE CHAIRMAN: They would have to be companion amendments, to forego this risk that Frank has brought out and laid upon the table.

MR. O'DONNELL: But we are not really faced with
212 that problem at the moment.

The Federal case is not attacking our constitutional convention format.

THE CHAIRMAN: But we are faced with coming up with a practical plan that has a fair and reasonable opportunity of being adopted by the general Assembly. And if this great risk is brought to the attention of the members of the General Assembly—which in all honesty we should bring to their attention; we should not withhold anything from them—then I think from the whole point of view of devising a plan, in our opinion that would have a practical opportunity of passing the General Assembly, we have to face directly this.

MR. KAVANAUGH: When opening the back door for a peek, we should take a look.

That is a further argument for further companion legislation.

MR. SCHMITTINGER: I do not agree with the principle that Delegates to a constitutional convention should be based on population. I am not sure that is a correct principle.

THE CHAIRMAN: You are not willing to take the risk that the Courts will so hold?

MR. SCHMITTINGER: No, I say the thing should be studied. I don't think you should accept that as a principle.
213 I am not sure.

THE CHAIRMAN: Should we accept it as a risk, and so advise the General Assembly that here is a risk?

MR. SCHMITTINGER: What I am saying is that we may well conclude that a Delegate to a convention ought to be on a geographical basis.

MR. E. S. WILSON: You will never get that.

MR. O'DONNELL: We will have to tell the General Assembly that our plan, if we adopt a plan as we have been talking about,—if asked, I think we would have to tell them that we have endeavored to act within the few guidelines we can find in the Federal cases, but that we cannot express an opinion that it will be held to be constitutional. We cannot guarantee it will be held to be constitutional. So there are certain risks even in adopting a plan for reapportioning the General Assembly.

Then I would think the additional risk that some future constitutional convention might be attacked is another risk we might have to live with.

MR. HARTNETT: Well, I think the point is, if the downstate members of the General Assembly feel that by giving New Castle County 10 additional Representatives they are also going to give them 10 additional Delegates in the constitutional convention, I would say we are in bad shape.

MR. O'DONNELL: I don't think that follows, and if
214 that is what you got from what I said, I must not have made myself clear.

The constitutional convention makeup is now spelled out in the constitution.

> "Such convention shall be composed of forty-one Delegates, one of whom shall be chosen from each Representative District by the qualified electors thereof,

and two of whom shall be chosen from" each of the three counties.

MR. HARTNETT: Don't you think if there were 45 Representative Districts, the Court would say that means there should be 45 Delegates to the Constitutional Convention, plus two from each county?

MR. O'DONNELL: I will go further than that. If that section of the Constitution should be attacked in the future, in my opinion it will be found to be unconstitutional, under the Baker vs. Carr foreword.

MR. HARTNETT: How about if the constitutional convention was based on equal representation for each county?

MR. O'DONNELL: Without regard to population?

MR. HARTNETT: Yes.

MR. O'DONNELL: I think it would be found to be unconstitutional.

215 MR. SCHMITTINGER: Do you think Baker vs. Carr applies to convention Delegates?

MR. O'DONNELL: I don't think it does, but I think it is broad enough that it would be applied to a future constitutional convention if a constitutional convention did not take it into account.

MR. SCHMITTINGER: Well, you accept the principle of equal representation in the Senate by counties.

MR. O'DONNELL: Right.

MR. SCHMITTINGER: Do you find the basis for that in Baker vs. Carr?

THE CHAIRMAN: In order to amend the Constitution of the United States you have to have the approval of how many geographical areas?

MR. O'DONNELL: My recollection is 38.

THE CHAIRMAN: Does this have any bearing upon the fact that historically in the United States, at least, and in many of the states including Delaware, that the plan for amending the constitution either piecemeal or generally has never borne any relationship to population?

MR. O'DONNELL: No, I wouldn't buy that. Because the general assemblies are historically in part and now by compulsion going to have some relationship to population.

THE CHAIRMAN: Yes, but let me say this, that the
216 General Assembly of New York is representative of how many people? 8,000,000, shall we say?

MR. HARTNETT: 16,000,000.

THE CHAIRMAN: The General Assembly of the State of Delaware, which is the representative of this State in determining whether a constitutional amendment shall be adopted, represents how many people? 400,000? Yet they are not weighted votes. They are each of an equal strength.

MR. O'DONNELL: Well, your conception is that Baker vs. Carr would not be an authority for—

THE CHAIRMAN: I am saying that the general assembly of a state with respect to a Constitutional Amendment of the Federal Constitution stands in the same shoes as a Representative in a Representative District in the State of Delaware with respect to amending the Delaware Constitution, because the General Assembly of New York speaks for 16,000,000 people. The General Assembly of Delaware speaks for 400,000 people, but that spoken word carries exactly the same weight without regard to the relative population of the two States.

MR. O'DONNELL: I am following your logic, but I doubt if the United States Supreme Court would.

THE CHAIRMAN: Well, I must say I cannot follow
217 their logic either.

MR. KAVANAUGH: Can we review a little bit in order to bring me back into line with what it is to which we are at the moment directing our attention?

MR. O'DONNELL: They are alarmed because enlarging the number of Representative Districts might be interpreted to mean that New Castle gets more representation in a constitutional convention. That is the heart of the problem.

MR. KAVANAUGH: May I suggest, then, that for discussion we consider giving to the representative proportional voting strength?

MR. O'DONNELL: In the constitutional convention?

MR. KAVANAUGH: Yes. Instead of carving up Brandywine Hundred into five new Representative Districts, let's discuss the feasibility of giving the Representative from that present District a vote equal to 5.

MR. HARTNETT: 5 votes? When the roll is called, and he said, "Aye," it would be 5 ayes?

MR. KAVANAUGH: Yes.

MR. E. S. WILSON: From my point of view it is difficult for a single Representative to serve 58,000 people. What you would be doing is continuing that on to 65,000, and particularly in view of the last meeting we had when
218 we talked about the difficulty down here in Gumboro, or someplace else. Our difficulties are greater than your stable population, because we have apartment house units in which the whole apartment house is empty, and new *move* people move in, and we have to get those people in and register them to vote between elections. We can't even block the Districts in June, because those people are not there until October.

MR. HARTNETT: That is true.

THE CHAIRMAN: Let me throw out this proposal, that rather than redistricting, or rather than precincting, that as to these Representative Districts there be a provision that nominations shall come from subdivided geographical areas in the District.

MR. HARTNETT: I think unless you say a Representative is going to come from a 15,000 unit of population, you are violating your idea of saying that 15,000 is the maximum that a man ought to represent.

MR. KAVANAUGH: Then you are advocating voting at large in the District?

MR. HARTNETT: No, I am recommending that the District be split. My problem is one of terminology.

MR. KAVANAUGH: Don't you fly in the face of your own question?

219 MR. O'DONNELL: No, he gets around that by calling the area he is representing a precinct.

MR. E. S. WILSON: I say that is a fraud and deception.

MR. KAVANAUGH: The Court is not going to buy semantics.

THE CHAIRMAN: No.

MR. HARTNETT: I think it is going to buy semantics in the constitution when you use different words.

MR. E. S. WILSON: Would it help any if we said that we should elect them at large until 1964, or 1966, or 1968, or 1970, at some future date, so that it would relieve the pressure that they are feeling on this constitutional convention?

MR. SCHMITTINGER: What concerns me is what happens if you gave three counties equal representation to a constitutional convention.

MR. HARTNETT: What is the objection to that?

MR. SCHMITTINGER: As I recall it, the Delegates to our Federal Constitutional Convention were not based on population. They were based on geographic areas. Is that correct, Houston?

THE CHAIRMAN: Yes.

MR. HARTNETT: There is some difference, because the states were sovereign, and counties are not.

MR. KAVANAUGH: Let's make the counties sover-

220 eign, and get the Legislature to pass a county home rule bill.

MR. HARTNETT: That was 150 years ago.

MR. KAVANAUGH: Well, they had nothing to start with, and they eventually matured into a Constitutional Convention.

THE CHAIRMAN: Well, the Maryland Supreme Court undertook to answer that argument—I think it was Maryland, but I will have to check it out. However, the answer was that at the time of the National Constitutional Convention, the states were not at that time sovereign, and their sovereignty has been eroded away ever since.

MR. O'DONNELL: The proposal that the gentlemen from Kent County have put forward would have New Castle County moving backwards. At the present time out of the 41 Delegates to the convention, 19 are selected from New Castle County. You would have us go on a one-third basis.

Now, I have two objections to that. One, I don't think the people of New Castle representing the tremendous population they do are going to countenance a backward move in that direction. And in my humble opinion, although to the best of my knowledge, and I haven't researched this because it has not been discussed before, I do not believe any Court would accept such a move if it should be attacked on a constitutional basis, because it would ignore population.

221 MR. HARTNETT: Then by the same token no Court would allow the present Delegate strength—

MR. O'DONNELL: Positively, if it should be attacked.

MR. HARTNETT: I agree with you. That is why I don't think Kent and Sussex Counties can go along with the constitutional amendment.

MR. O'DONNELL: We have really come to a very fundamental point, Mr. Chairman.

THE CHAIRMAN: Yes, we have.

MR. KAVANAUGH: It only convinces me that you might as well face up to it and recommend consolidation and division on the basis of some type of a norm. Because you speak in behalf of New Castle, you are perfectly willing, as far as your County is concerned, to say, "I am for division."

MR. HARTNETT: Well, here is the problem, and it is right smack here, and you might as well face it.

In a constitutional convention a majority rules, and if the constitutional convention is composed of a majority from New Castle County, Kent and Sussex Counties will be afraid, and with a great deal of justification, that the Senate will not remain equal between the three counties. That is the bastion of representation for the rural areas.

Any way you cut the pie in the Senate, once the
222 Senate is put on the basis of population representa-

tion, there will be no representation for the rural areas, or down-State areas of Delaware. And if down-States Delaware permits a constitutional convention to come about whereby the majority of the delegates are from New Castle County, and the vote of the constitutional convention is by majority representation, I think we will see the end of geographical constitution.

As it is now, it takes three-quarters, and New Castle has to agree to it as well as Kent and Sussex. But in a constitutional convention, it is by majority rule.

MR. KAVANAUGH: If I were to express my feelings with regard to a constitutional convention, I would say to you I see nothing wrong with calling a constitutional convention which would prescribe a different percentage—

MR. HARTNETT: Except that Frank says, and I am inclined to agree with him, there is a good chance that any constitutional convention would have to be on the basis that the Delegates be apportioned according to population, under Baker vs. Carr, And I think that principle is going to go down eventually to city governments, county governments, school boards, and everything else in the country.

MR. KAVANAUGH: This again only indicates the wisdom of the companion legislation.

223 MR. HARTNETT: Quite the contrary. It indicates that down-State could not possibly go along with the constitutional amendment.

MR. KAVANAUGH: Well, I do not buy your statement that a constitutional convention would eliminate rural representation, in either branch of the Legislature.

MR. HARTNETT: Well, the Senate is what I am worried about. We are going to lose the House. Let's face it. That is in the cards. The question is whether the rural areas are going to be represented in the Senate, or not represented.

THE CHAIRMAN: Gentlemen, perhaps this criticism could be met by providing for an amendment to the constitution

that would require more than a mere majority of the vote, or such as the Federal Constitution requires:

> "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, . . ." (Article V.)

It seems to me if we adopted a three-fourths rule
224 for constitutional conventions, we would be avoiding all of this.

MR. HARTNETT: Except that New Castle County may well have three-quarters.

THE CHAIRMAN: Well, perhaps I will say if that time should ever come New Castle should have three-quarters of the total representation in the General Assembly.

MR. HARTNETT: They have two-thirds of the population of the State now.

THE CHAIRMAN: I mean to say, under the format we have they would not come up with three-quarters of the Representatives in a constitutional convention.

MR. HARTNETT: I think if our provision as to the election of Delegates to the constitutional convention were attacked, the Court may well say that the Delegates to the constitutional convention must absolutely represent the population. And right today New Castle has two-thirds of the population of the State.

MR. O'DONNELL: I think, Mr. Chairman, we have to view it in this light: If we in the State of Delaware do not do something constructive towards the adoption of a rational plan for our Legislature, we may have a Legislature elected at large. And I do not have to spell out what that might

mean. Whereas, the constitutional convention prob-
225 lem you people are worried about is remote. It may or may not come about. But we are now faced with an immediate possibility of an election at large.

It seems to me that practical people—and I have found most Kent and Sussex people to be very practical—would rather run the risk of having some future constitutional convention which under present law could not come about until 1965 be declared to be unconstitutional, than to have an election at large in 1962.

Now, I would prefer to do something constructive so we can urge to the Court that we are doing something, and run the risk of any future litigation we might get into in connection with a constitutional convention which may or may not come about.

Because we do not know what the referendum, if any is held in November, will decide. But I think we do know—at least I think I know—that the Court is going to tell us to hold an election at large unles we can show them that we are in good faith proceeding to correct certain inequities.

I think that is the problem you people have to face up to.

Are you going to worry about a possible finding of unconstitutionality of the section dealing with constitutional conventions? Or are we going to permit the Federal Court to order an election at large?

226 MR. HARTNETT: I agree.

MR. E. S. WILSON: Isn't it true that the section of the Constitution regarding a Constitutional Convention is not a point at issue in this suit?

MR. O'DONNELL: That is so.

MR. HARTNETT: It won't take long to file suit.

THE CHAIRMAN: It is only a point of concern, not a point at issue.

MR. HARTNETT: This is true. But proceeding farther along the matter of the constitutional amendment, if we want to protect, insofar as possible, the present method of

electing the Delegates to the constitutional convention, realizing there is some possibility that the present system is unconstitutional, although we do not know whether it is or not, we from down-State do not want to weaken our position in the constitutional convention any more than we have to.

MR. O'DONNELL: Can you have your cake and eat it?

THE CHAIRMAN: That is the reason I am afraid of precincts.

MR. O'DONNELL: One of the reasons.

MR. SCHMITTINGER: Would this be a good place to stop?

MR. O'DONNELL: It would be for me.

THE CHAIRMAN: I was hoping we could get through
227 the whole thing tonight.

MR. O'DONNELL: Could we vote on that matter?

THE CHAIRMAN: All right. Your motion is that these additional Representatives in the House of Representatives shall be allocated on the basis of redistricting those present Representative Districts which are entitled to these additional Representatives?

MR. O'DONNELL: Yes.

MR. E. S. WILSON: Could you put in the date of '66?

MR. O'DONNELL: Doing it by 1966?

MR. HARTNETT: That would leave the 1964 election at large. What is the reason for that?

MR. O'DONNELL: I could buy that.

MR. WILSON: 1966.

MR. HARTNETT: What is the reason for 1966 and not 1964?

MR. WILSON: Purely organizational, practical.

MR. SCHMITTINGER: The Legislature would have all next year to do it, wouldn't it?

MR. HARTNETT: They would have two years to do it now.

MR. O'DONNELL: Not really. If it is going to be done next year, if it is going to be brought to a conclusion next year, they have got to get the first leg on now within the next—

228 MR. HARTNETT: Within the next two weeks. It has to be three months before the election.

MR. O'DONNELL: Right.

MR. HARTNETT: But then they wouldn't have to worry about it until after it is passed in January. Then it would have the period between January and 1964 to do it. There are two sessions of the General Assembly, 90 days, and 30 days.

MR. O'DONNELL: That does not count for constitutional purposes.

MR. HARTNETT: I know it does not, but my thought was that the redistricting would not be in the constitution. I thought you said you wouldn't affect the constitution.

MR. O'DONNELL: It is already in, and we have got to get it out in two sessions.

MR. HARTNETT: But how are you going to get it done within the five Districts? Are you going to set the metes and bounds, or do it by simple act of the General Assembly?

MR. O'DONNELL: That is the next issue we are going to discuss, the mechanics of that.

MR. HARTNETT: Well, it makes a big difference whether it is done in 1964 or 1966, the mechanics.

MR. KAVANAUGH: Would it help any, then, if you
229 had an alternative proposal that the limitation be the constitutional convention or 1966, whichever occurs first?

MR. HARNETT: My question is, why '66 instead of '64? That is my only question.

MR. E. S. WILSON: Just practicality, that is all.

MR. HARNETT: I say if it is going to be a simple act of the General Assembly to do it, there is no need for time. If it is going to go into the constitution and have to be put in there by amendment, of course, it would need the time.

MR. E. S. WILSON: You are thinking of it in the Legislature. I am thinking of it in the field.

MR. HARTNETT: Well, it wouldn't take 4 years to dump it out in the field.

THE CHAIRMAN: Gentlemen, we have a motion. Let's get on with this thing. Are we ready to vote on the motion?

MR. HARTNETT: Would you repeat the motion?

MR. E. S. WILSON: Will you add the 1966?

THE CHAIRMAN: Well, I don't know if I can repeat it accurately, but I will state it in substance as I understand it, subject to correction by Mr. O'Donnell.

It has been moved that with respect to the provisions of the plan relating to the reapportionment of the House of Representatives, the allocation of additional Repre-
230 sentatives in excess of one for each of the existing Representatives be on the basis of redistricting the present Representative District involved.

MR. E. S. WILSON: For the election of 1966.

THE CHAIRMAN: No, that is just period. He hasn't said that.

MR. O'DONNELL: That is a fair restatement of what I said.

THE CHAIRMAN: Very well. That has been seconded, I believe.

Any further discussion? (No response.)

All those in favor signify by raising their right hand.

(For the motion: Frank O'Donnell and E. S. Wilson.)

THE CHAIRMAN: Those opposed raise their right hand.

(Against the motion: Houston Wilson, Harold Schmittinger, Maurice A. Hartnett, III, Thomas L. Johnson, Gerard P. Kavanaugh.)

THE CHAIRMAN: All right, do I hear another proposal as to how it should be allocated?

MR. SCHMITTANGER: I will just say, by subdividing the Representative District according to population.

THE CHAIRMAN: All right, we have that motion.
231 Do I hear a second?

MR. HARTNETT: I will second that.

MR. KAVANAUGH: Could we have a discussion? How would that work?

MR. SCHMITTINGER: Well, I assume we are going to empower the Legislature to do this, and it would have to be either a precinct, or ward, or whatever you are going to call it, related to the 15,000 figure geographical area. Call it a precinct, or a ward, or whatever you want to call it, of the 1st Representative District, or of the 5th Representative District, or whatever.

THE CHAIRMAN: Do you understand the motion?

MR. KAVANAUGH: I am not sure that I do.

THE CHAIRMAN: All right, you may enquire farther into what the motion is.

MR. KAVANAUGH: I am not interested in nomenclature. I am primarily interested in the mechanics of the thing.

As I view the situation now, the lowest unit in your elective structure is the election district.

Now, these will run in the neighborhood of maybe 800 to 1,200 people. We have so many election districts, and we have some Representative Districts that have as many as 40 election districts.

232 MR. E. S. WILSON: You mean 48.

MR. KAVANAUGH: Well, there are 40 or 48, but they are pretty high in comparison to others that maybe have only 17 election districts.

When Harold says that the extra Representatives or additional Representatives will be elected on the basis of Districts, then I don't know whether he is talking about election districts—

MR. SCHMITTINGER: No, I wasn't talking about election districts.

MR. KAVANAUGH: What type of districts are you talking about that are not election districts?

MR. SCHMATTINGER: It would be a geographic distribution wherein 15,000 or more people reside who are entitled to elect one Representative to the General Assembly.

MR. KAVANAUGH: Then I direct your attention to the fact that all you are doing is transferring the problem of the Representative Districts as we now known them down to the lower unit in your election structure, necessarily the election district.

MR. HARTNETT: Not the present election district. We are creating a new one, because there is no—

MR. O'DONNELL: They are creating a new term.

MR. HARTNETT: I don't care whether you call it a
233 precinct, or what you call it.

MR. KAVANAUGH: To me a precinct means nothing more than a ward or a unit, the lowest unit of the people who comprise an elective division.

MR. HARTNETT: Coin a new word, then.

MR. O'DONNELL: They want to have a district Representative in the General Assembly whose area shall not be called a Representative District, becuase that is a term used in the constitutional section.

MR. E. S. WILSON: If you postpone it until '66 you will have your convention over with.

MR. HARTNETT: Well, I would be in favor of postponing until '66 if you didn't elect any until '66. But I think you ought to elect.

THE CHAIRMAN: Do you understand the motion?

MR. KAVANAUGH: I understand the motion, but I don't like it.

THE CHAIRMAN: Are you ready to vote?

All those in favor signify by raising their hand.

(For the motion: Thomas L. Johnson, Murice A. Hartnett, III, Harold Schmittinger.)

THE CHAIRMAN: Those opposed?

(Against the motion: Gerard P. Kavanaugh,
234 Frank O'Donnell, E. S. Wilson, and H. Wilson.)

MR. SCHMITTINGER: As I said five minutes ago, I think we are at a good place to stop.

THE CHAIRMAN: There is one other proposal, and that is that they be elected at large.

MR. O'DONNELL: From the present Representative Districts?

THE CHAIRMAN: Yes.

MR. E. S. WILSON: Until 1966.

THE CHAIRMAN: And thereafter what?

MR. E. S. WILSON: That would be decided by the Legislature or by a constiutional convention.

THE CHAIRMAN: The difficulty I find with this, Mr. Wilson, is, if we come up with a plan, and this is incorporated into a proposed constitutional amendment, then if nothing is done by 1966, the thing will be dangling, and we don't want to leave something dangling in our constitution.

MR. KAVANAUGH: Except that you would revert to the unequal situation which you now have and which is presently the subject of a court suit.

THE CHAIRMAN: That is a very real possiblity. I think the choice is not a question of delay. The choice lies between election at large, or election by geographic
235 subdivisions of existing Representative Districts.

Now, we have not been able to come to any affirmative action on electing them by way of subdividing the present Representative Districts by whatsoever name you may wish to use. Then can we come to some agreement that in view of the fact we have not been able to come to an agreement on that principle, we come to some agreement insofar as our plan is concerned and let the future deal with it later on, that they shall be elected at large, and let the future take care of itself?

MR. JOHNSON: You are electing your one by electing at large, anyway.

MR. O'DONNELL: At large within the Representative Districts.

THE CHAIRMAN: Yes, that is what I mean. That is the only alternative I can see now at this late hour.

MR. SCHMITTINGER: Well, Houston, are you satisfied this is the last meeting we are going to have? Is that why we are rushing this

MR. E. S. WILSON: I would hope so, because there was some comment that we would finish this off if he stayed all night at the second meeting. I would rather have a third meeting than to stay all night.

I would buy your suggestion of electing at large,
236 but I have difficulty with my consoience because I feel that ultimately they should be redistricted. So maybe you should say at large until 1966, and thereafter on a geographical basis.

MR. SCHMITTINGER: We may be able to find a solution at some other meeting. I think the problem is the delegate strenght at a constitutional convention.

MR. HARTNETT: Yes. If we could resolve that we could go along with calling them Representative Districts.

MR. E. S. WILSON: We have one question we haven't discussed very much, and I think it is essential that we provide how these districts shall be enlarged in the future.

MR. O'DONNELL: The mechanics.

MR. E. S. WILSON: Yes.

MR. KAVANAUGH: Mr. Ernest Wilson, just for discussion purposes, if you changed your date of 1966 to coincide with the next Federal Census, which would be 1970, would that help you?

THE CHAIRMAN: The great difficulty I have is going back to Sussex County and saying that here we are planting the seeds of five apple trees instead of one, under this quotient system. This is the thing that bothers me from a practical point of view of getting two-thirds majority of the General Assembly to adopt our plan, aside from their constitutional convention problem which is at the
237 present not immediately before us, but which is a point of concern.

MR. HARTNETT: My plan of calling them precincts would have taken care of that.

THE CHAIRMAN: You would necessarily have to say that when that particular precinct reached the quotient strength—

MR. HARTNETT: No, oh, no, no. When that Representative District got the additional quotient it would get an additional Representative, not when the precinct did.

MR. SCHMITTINGER: Just like the states.

MR. HARTNETT: Just like the states.

MR. O'DONNELL: Mr. Chairman, this question might be presented with regard to the motion of an election at large. If such a motion should be brought up, I would be in a very bad position, in that I had not discussed that possibility fully with some of the people I feel I represent. It has been discussed somewhat.

Since we have been unable to reach agreement on a plan based on redistricting, as I understood the term, and since it appears that we might have to resort to an at-large election within the present Representative Districts, at least for some number of years, I would like to discuss that with some of the people in New Castle County. I therefore regretfully—although I shared your hope that we
238 might conclude our meeting tonight, and I am not going to put this in the form of a motion now, because I don't want to force other people into it, but I would hope that this group might agree to adjourn to meet again so that some of us could discuss this with the people we represent.

I would imagine perhaps Mr. Kavanaugh and maybe Mr. Wilson have some reservation about this at-large provision, too, because his party might be seriously hurt, and some district of mine might be seriously hurt by a plan that would disenfranchise thousands of people, and this does in a sense, because we would be electing Representatives the way we are presently electing city council, and both of our parties, I believe, are moving towards a termination of that arrangement.

MR. E. S. WILSON: Yes.

MR. O'DONNELL: So it would be a bit illogical for us to adopt such a plan, at least without further discussion with our people. At least that is my sentiment, and I would like to throw out the fact without making it in the form of a motion, that perhaps we do adjourn shortly, because that really presents a very serious problem, and puts us in an inconsistent position with respect to city council, and puts us in a position where—well, we are not differing very much from what the Court might order us to do, anyway. It just puts us in a position where I have not had any guidance, and I would like to talk to some more

239 MR. E. S. WILSON: I feel the same way.

THE CHAIRMAN: Very well. Then suppose we leave that with the idea that it will be passed over until we have another meeting.

Is there any other problem in connection with the apportionment of the House that we have not yet covered thus far?

MR. HARTNETT: Yes. Assuming we all eventually agree that this Representative District is going to have to be broken down someway, somehow, how is it going to be done? That is, by whom is it going to be done?

THE CHAIRMAN: Well, that will be a facet of the thing we are going to pass over. But is there any other facet we have not covered?

MR. HARTNETT: Well, even if we elect them at large for the next two years, we all agree sometime it is going to be broken down.

THE CHAIRMAN: I think you probably want to consult with your so-called constituents on all facets of this problem.

MR. O'DONNELL: Yes.

MR. E. S. WILSON: Yes.

THE CHAIRMAN: Is there any other phase of this thing we have not yet covered as far as the plan is concerned for the House?

240 I thought we might go back to the Senate and deal with this question of how we are going to allocate the additional Senators.

MR. O'DONNELL: That is a Kent and Sussex problem. I would like to avoid discussion of that before we cover the rest of the plan.

THE CHAIRMAN: Well, I think Sussex has come up with its answer as far as it is concerned.

MR. O'DONNELL: Is there any general topic, general to all three counties, before we discuss that local problem?

MR. HARTNETT: I have one as to which I do not expect a decision tonight.

Are we going to set a maximum number with the idea then when that maximum number is reached there will be a reexamination of the whole problem?

I personally feel there should be a maximum number, otherwise the House of Representatives could reach a ridiculous size.

I think the decision should be to pick a number and say when it reaches that, there will be a general reapportionment and this whole thing will have to be gone through again, painful as it may be.

MR. SCHMITTINGER: You might do more than that
241 and pick a number and prescribe that the quotient would rise just as in the United States Constitution.

MR. O'DONNELL: By giving each District one, and putting a top on the largest District it seems to me we are being inconsistent.

It seems to me if we are going to have numerical representation, representation based on population, it has to be that unless we are going to break away from the basic one.

If you picked a number such as 50 and divide the State and said it will always be 50, and it will be strictly on the basis of numbers, then I do see a top. But if we are going to have a floor, such as we have here, then I feel we must

not have any ceiling, because we must have a representation on numbers.

THE CHAIRMAN: I say that is something that may well happen in the future. I do not anticipate it will happen in the foreseeable future. But when it does happen, I think Delaware should wrestle with that problem at that time. We do not have time to wrestle with it here.

MR. HARTNETT: The only problem is, if we set a maximum ceiling of, say, 60, then when it reaches that point it would bring it to a head. If we set no ceiling at all, the Legislature itself will be disinclined to set a ceiling, because they will not want to legislate themselves out of office.

242 THE CHAIRMAN: If you retain the principle of 1 per Representative District at the bottom, and set a ceiling at the top, this would weaken the plan in the eyes of the Court.

MR. HARTNETT: It would weaken it unless you said at that time there would be a reapportionment.

I admit you can't set the ceiling. You have got to provide when that ceiling is reached there would be a reapportionment.

THE CHAIRMAN: But there again when you say there will be a reapportionment, period, you would have to specify what the plan for reapportionment would be at that time. Or you would simply have a constitutional amendment that would say there would be a reapportionment at that particular moment, but suppose the order amending the processes were unavailable to you because the General Assembly, or however the constitution is to be amended, fails to do it?

MR. HARTNETT: Then the Federal Court would step in, as they did in the Tennessee case of Baker vs. Carr.

THE CHAIRMAN: Aren't we working on the principle of avoiding the Court's having to act?

MR. HARTNETT: I would agree, but I would also not like to see the General Assembly reach the size of 100 members.

THE CHAIRMAN: Wouldn't that be sufficient pressure in and of itself?

243 MR. HARTNETT: No, I am afraid it would't because the members of the General Assembly would have a vested interest at that time. They would say, "Let it go to 200."

MR. KAVANAUGH: How many people would you have to have in Delaware before it got to 100?

MR. E. S. WILSON: 2,000,000. Well, not quite that many.

MR. O'DONNELL: A million and a half, at 15,000 apiece.

MR. HARTNETT: Well, what would it have to be to be 100?

THE CHAIRMAN: That is what he says.

MR. O'DONNELL: A million and a half.

MR. KAVANAUGH: Well, I would like again to make this comment. I think we are not reaching the fundamental issue, and that is the question of redistricting. I think what we are doing is satisfying ourselves with an expedient, stopgap measure, whether you view it from the standpoint of quotients or any of the other ways that have been discussed here previously tonight. I think unless we get back to fundamentals and admit to ourselves that this is a problem that can only be solved by redistricting, we are going to flounder beyond the point where we can be of service to the parent body that brought us into being. Amend.

244 Is there a motion to adjourn?

THE CHAIRMAN: Before we adjourn, shall we take up the matter of the order of business at the next meeting, so we will have some agenda to go by?

Number one would be, as I understand it, the question of the allocation of the additional Representatives within the Representative Districts entitled thereto. Ths will be considered.

Number two. I think the general tenor is that Kent and Sussex Counties should come up with a proposal with respect to the allocation of the additional Senators. That will be our local responsibility for consideration of the entire Committee.

Those are the two matters which remain undetermined by the step-by-step procedure we have been taking so far.

MR. HARTNETT: The method of allocating. And, who is going to do the allocating?

MR. SCHMITTINGER: And when?

MR. KAVANAUGH: In the Senate, or the House?

MR. HARTNETT: The House.

THE CHAIRMAN: That is right. That is all a part of that problem No. 1, which is the question of how. And how would include method of allocating the additional
245 Representatives within the Representative Districts entitled thereto. That would inclule method.

The other is the question of how the additional Senators shall be allocated in Kent County and in Sussex County.

Then we will have an overall plan for final consideration if we jump those hurdles.

MR. O'DONNELL: When were you thinking of calling another meeting?

THE CHAIRMAN: I am open to suggestion. I think it should be as soon as possible.

This may be off the record.

(Following a discussion with regard to the time of the next meeting:)

THE CHAIRMAN: Gentlemen, a third matter on the agenda before we review the overall handiwork we have hammered out here would be the vote upon the question of the constitutional convention.

MR. O'DONNELL: We have decided among ourselves, Mr. Chairman, subject to the wishes of the larger group, that we would like to meet with our local people Friday night in Wilmington, so we also think that it would be well for us to have such a meeting prior to the time we meet with you people again.

Is that inconsistent with your thinking?

246 THE CHAIRMAN: Not at all.

(Following further discussion with regard to the time of the next meeting:)

THE CHAIRMAN: All right, gentlemen, do I hear a motion that we adjourn until 3 o'clock Saturday afternoon, and that we reconvene here again?

MR. SCHMITTINGER: Well, I will be here by 5 o'clock, and I would suggest there is a lot that could be done with the New Castle County problems before I get here.

THE CHAIRMAN: We can at least get a considerable amount of work done subject to your views, before you arrive.

MR. SCHMITTINGER: Yes.

MR. O'DONNELL: And we will reconvene here unless notified to come to some other place?

THE CHAIRMAN: Yes. And it is also agreed that I will notify the Governor that we shall be ready to present our report on Monday evening, July 23rd.

With that understanding, do I hear a motion to adjourn?

MR. KAVANAUGH: I so move.

THE CHAIRMAN: Very well. We are adjourned until 3:00, P. M., Saturday, at this same place.

(Whereupon at 12:05, A. M., July 18, 1962, the sub-committee meeting is adjourned to reconvene at 3:00, P. M., on Saturday, July 21, 1962, at the same place.)

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247 Sub-Committee meeting held in the Ridgely Room, Treadway Inn, Dover, Delaware, 3 o'clock p.m., July 21, 1962,

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248 PROCEEDINGS

(The meeting was called to order by Mr. Houston Wilson, Chairman, at 4:25 P. M., in the Ridgely Room of the Treadway Inn, Dover, Delaware.)

CHAIRMAN: Gentlemen, if there is no objection, until Mr. Schmittinger arrives I am going to designate Mr. Hartnett as Acting Secretary. He and Mr. Schmittinger are both from the same town and they can get their heads together.

Just before we adjourned the other night there was an outline of the agenda.

Number one is the question of the allocation of the additional representatives within the Representative districts entitled thereto.

Number two is that Kent and Sussex Counties should come up with a proposal with respect to the allocation of the additional senators for those counties. It would be a local responsibility for the consideration of the entire committee.

Number three would be the matter of the call of a constitutional convention.

Number four would be a review of the overall handiwork.

Perhaps it is possible for us to dispose of Number 2 rather rapidly. Senator Johnson and I have come
249 up with a proposal with respect to the allocation of the senators for Sussex County. Do you want to make that report, Senator?

MR. JOHNSON: We have suggested that the county be divided in half, and one senator elected from Representative Districts 1, 2, 3, 4, and 5, and the second senator be elected from Representative Districts numbers 6, 7, 8, 9 and 10.

That divides the county into two almost equally by area and population.

Mr. O'DONNELL: Does that superimpose a senator on top of other senatorial districts?

MR. WILSON: Yes.

MR. O'DONNELL: He would be running at large?

MR. JOHNSON: Yes.

MR. O'DONNELL: That is a new concept for Delaware polities.

CHAIRMAN: We thought there would be two choices: for both of them to run at large throughout the entire county, or to run at large throughout a division of the county.

MR. O'DONNELL: There was a third one: to realign the whole situation.

CHAIRMAN: The third one was to realign the entire county.

MR. O'DONNELL: I wasn't objecting; I was just
250 making sure I understood you.

CHAIRMAN: There would be a problem here of how they should be designated with respect to the geographical area. It seems to me they could be called either Senatorial District No. 6, or No. 7, or they could be called Senatorial District No. 1 at large, and Senatorial District No. 2 at Large, Sussex County.

Mr. Hartnett, you had done some thinking on that.

MR. HARTNETT: I took the liberty of drawing up a proposed draft for a constitutional amendment incorporating what we had agreed on. I felt that the most logical way to do it would be to call it Number 6, and then say the First, Second, Third, Fourth and Fifth Representative Districts, and then the Number 7 would be the Sixth, Seventh, Eighth, Ninth and Tenth Representative Districts. That would be consistent with the present wording of the constitution.

MR. O'DONNELL: And the people in those areas would vote for just one senatorial candidate?

CHAIRMAN: Yes, of these two.

MR. O'DONNELL: Under his arrangement.

MR. HARTNETT: Sometimes. Possibly they would be electing two senators.

MR. POPPITI: Wouldn't there be some occasion when they would be voting for a senator in their own district,
251 as it now exists, and then in addition to that be voting for the other senator representing the larger area?

CHAIRMAN: Yes. That's the reason I had in my own mind—I don't know that there is any great significance in calling it Senatorial District No. 1 at Large, and Senatorial District No. 2 at Large. Let's take the First Senatorial District, which is now composed of Reperesentative Districts 1 and 2. Conceivably they would be voting for sena-

tor in Senatorial District No. 1, and then they would be voting for a senator in Senatorial District No. 6, or in Senatorial District No. 1 at Large, whichever one you would want to call it.

MR. HARTNETT: I think if you want to use the "at large" it ought to be Number 6 at Large. I don't think you should have two Number 1's, it would be confusing. If you want to use 6 call it 6 at Large, or just 6. That is my personal opinion. Of course, in New Castle County they go to 7 already.

CHAIRMAN: Well, do you want to combine the two thoughts and call it 6 at Large and 7 at Large, so that they will know that these are districts at large rather than the old historic senatorial districts?

This would leave one other problem: the mechanics of getting the thing going. Which one of these two would serve for two years and the other for four years at the outset?

MR. HARTNETT: I arbitrarily picked No. 6, because
252 6 came first.

THE CHAIRMAN: Does that suit you?

MR. JOHNSON: That suits me.

THE CHAIRMAN: So the summary for Sussex County would be that these two senators would be elected from Senatorial District No. 6 at Large, composed of Representative Districts 1, 2, 3, 4, and 5, and from Senatorial District No. 7 at Large, which would be Representative Districts 6, 7, 8, 9 and 10. And at the outset the senator from Senatorial District No. 6 at Large would serve for two years, and the senator from Senatorial District No. 7 at Large for four years.

Shall we vote on this? Do I hear a motion?

MR. JOHNSON: I will make a motion. You draw the motion up, Mr. Hartnett.

MR. HARTNETT: Do you want it put in exact language? All right.

I move that the committee vote in favor of proposing a new section to the constitution, to read:

"The following words are added following the words number 5, the ninth and tenth Representative Districts, in that part of Article II, Section 2, of the constitution dealing with the senatorial districts in Sussex County: 'Number 6 at Large, the First, Second, Third, Fourth and Fifth Representative Districts; Number 7 at Large, the
253 Sixth, Seventh, Eighth, Ninth and Tenth Representative Districts."

I thought we would get Kent and Sussex together.

THE CHAIRMAN: We have the motion before us. Is there any discussion? This is as to Sussex County.

Any questions?

Are you ready for the question? All those in favor signify by raising your right hand.

Those opposed.

It's unanimous.

Now I'll call on Mr. Hartnett for the report on Kent County.

MR. HARTNETT: Kent County was exactly the same as Sussex; that is, Representative Districts Nos. 1, 2, 3, 4 and 5, and Representative Districts Nos. 6, 7, 8, 9 and 10. But Mr. Schmittinger has some objection to that, so I think we had better pass the proposed districts until he gets here. His proposal is that it be the 1st, 2nd, 5th, 7th and 8th to constitute the Sixth Senatorial District, and the 3rd, 4th, 6th, 9th and 10th Representative Districts to constitute the Seventh Senatorial District.

I don't have any objection. I think he feels that the Republicans would have a better chance that way.

THE CHAIRMAN: Say that again. Your proposal is
254 the same as Sussex; his is what?

MR. HARTNETT: The 1st, 2nd, 5th, 7th and 8th shall constitute the Sixth at Large district.

THE CHAIRMAN: Then that would leave the 3rd, 4th, 6th, 9th and 10th.

MR. KAVANAUGH: You are dividing it horizontally; he is dividing it longitudinally.

MR. HARTNETT: In either case they would be contiguous.

THE CHAIRMAN: One is a north-and-south division; the other is an east-and-west division.

MR. POPPITI: That's what it amounts to.

MR. HARTNETT: So I think perhaps we had better pass as to which specific districts they are going to be.

MR. POPPITI: At any rate, you are going to follow the same principle.

THE CHAIRMAN: I assume you will each want to present your views to the entire committee before we take a vote.

MR. POPPITI: The principle is going to be the same. They are going to divide the county in half and have two senatorial districts at large.

THE CHAIRMAN: That's right.

MR. HARTNETT: I think I can move, because Harold is in agreement with me, that the next section to be added
255 to the constitution will be:

"The following words are added immediately following the words added by section blank above: The first senators elected from the Sixth Senatorial District of Kent and Sussex Counties shall serve for a two-year term only. Thereafter their successors shall serve for a full four-year term."

THE CHAIRMAN: And the Number 7 at Large would be automatic?

MR. HARTNETT: Automatically four years. Since you say in Sussex County the Democrat would be for a two-year term, here it would be a Republican for a two-year term.

MR. KAVANAUGH: That would be pure coincidence.

THE CHAIRMAN: Do I hear a second to this proposal as to the two- and four-year term?

MR. POPPITI: I second the motion.

THE CHAIRMAN: Any discussion? If not, all those in favor signify by raising your right hand.

Those opposed.

It is unanimous.

Gentlemen, I guess we are ready to proceed to New Castle County. This has to do with the question of how the additional representatives in the Representative Districts entitled thereto shall be allocated.

MR. WILSON: I would like to propose that they be
256 elected at large until after the election of 1964, and the districts be subdivided for the 1966 election.

THE CHAIRMAN: And as to that subdivision, who shall be empowered?

MR. O'DONNELL: Elected at large, how?

MR. WILSON: By the hundreds.

THE CHAIRMAN: Up until when?

MR. WILSON: Until after the 1964 elections, and after that the district be split into representative districts.

THE CHAIRMAN: And who shall be authorized to do this? The General Assembly?

MR. WILSON: There are two or three bills now in which they have different people draw these district lines.

THE CHAIRMAN: They are drawn in the bills themselves, are they?

MR. WILSON: Yes. One is the Governor. Each one has a redistricting committee, and I think in view of the fact that this thing has to be carried on after the 1970 census and the 1980 census, we might just as well provide for that at the time we redistrict this.

The Governor's bill says the Governor, the Attorney General, the Supreme Court Justice, and the Governor is the chairman.

THE CHAIRMAN: Is that the Chief Justice?

257 MR. WILSON: Yes, the Chief Justice; and one member from each political party. And there shall not be more than three of the commission of any one party.

MR. KAVANAUGH: I am confused on that. There are two separate bills. One commission is a three-member commission consisting of the Governor, the Attorney Gen-

eral of the state, and the Chief Justice of the State Supreme Court. The second bill is a five-man commission consisting of the Governor, the President of the University of Delaware, the Farmers' Bank, and the head of each of the two political parties. Was that it?

MR. WILSON: Yes.

THE CHAIRMAN: Under your idea, following the 1964 election they will do the redistricting of these affected representative districts?

MR. WILSON: Yes.

THE CHAIRMAN: And then, carrying that on through, after the 1970 census has been duly published and certified, then they will carry it on throughout the entire state.

MR. WILSON: Right.

MR. O'DONNELL: What is your reason for waiting?

MR. WILSON: Purely to get time to get organized and get turned around. I am not sure that we will have
258 any elections—if we have a constitutional amendment we won't have an election until 1964.

MR. POPPITI: Why can't the new districts within the representative districts be set up—let's assume that we have agreement on our propsed constitutional amendment, and that it is passed immediately after the new legislature convenes in January. Then it is effective for 1964, is it not?

MR. WILSON: I am not sure that you can pass the constitutional convention—

MR. POPPITI: Just the amendment.

MR. WILSON: Oh, yes.

MR. POPPITI: Suppose we pass the amendment immediately, and the second leg immediately after the legislature convenes. Then the consitution has been amended. Why can't we then get into the legislature and set up the districts, the new divisions within the representative districts?

MR. O'DONNELL: It would have to be in the constitution.

THE CHAIRMAN: You mean authorize the redistricting committees?

MR. POPPITI: Yes. Why can't we do it before the 1964 elections, that's my point.

MR. KAVANAUGH: If you have to write it into the constitution your problem is going to be one of getting agreement on the geographical boundaries of the new
259 representative districts.

THE CHAIRMAN: Just for the purpose of clarification, what Mr. Poppiti is trying to say is that following this constitutional amendment, whichever one of these redistricting committee set-ups is the approved one, that that committee would then be authorized to redistrict the affected representative districts for 1964.

MR. POPPITI: Yes. Why do we wait until 1966, Ernie?

MR. WILSON: I haven't any great objection to 1964. I just shudder at the idea of doing it in 1962.

MR. POPPITI: You are going to have to face up to it anyhow.

MR. O'DONNELL: You would be doing it but it would not become operative until 1964.

MR. POPPITI: See, we are going to have an election now under the old basis. We can't do anything.

THE CHAIRMAN: Unless the court changes it.

MR. POPPITI: Yes. But assuming we are satisfied with our proposal, nothing happens at this election. The second leg is voted on in January, then why can't the redistricting committee function immediately and set up the new districts for the 1964 election?

MR. O'DONNELL: If you do it that way, of course it could. The other way to do it, and I realize there is
260 quite a time problem, would be to draw the lines so that there would be in the amendment, which might be adopted by the current session and the next session, provision so that they would be on the ballot in the new districts in 1964.

However, if I may say so, I think we have gotten the cart before the horse because this is the point that Maurice was disagreeing with. We might have to have two reports

with respect to this matter, but I wonder if Maurice, after discussing it with his people—I think Mr. Wilson's position, and mine, and Mike's and Jerry's, were the same, that they thought there should be new districts. We are now talking about when they will come to pass.

Are you still opposed to us having new districts?

MR. HARTNETT: Well, it's mainly a question of nomenclature. We still think that the present districts ought to be the basis for representation, and within those districts they should be divided into what I now preer to call divisions, rather than the word "precinct." The word "precinct" connotes something which it is not.

I would say the representatives of Brandywine Hundred, the Sixth Representative District, First Division, Second Division, Third Division, Fourth Division, as it may be necessary to have additional representatives there.

261 As to how Brandywine Hundred would be divided into divisions, it would be the same problem as to whether you call them representative districts or call them divisions whether you are going to do it in the constitutional amendment or whether you are going to delegate it to a commission to do.

MR. O'DONNELL: And the reason for your reluctance to call them districts is because of the constitutional convention?

MR. HARTNETT: That's part of it. The other part is that we are basing this on the assumption that the present 35 representative districts will all have at least one representative.

THE CHAIRMAN: Delegate.

MR. HARTNETT: That is more of an argument to justify that than that the present 35 representative districts are traditional and we shouldn't abandon them. It would be better to break them down into divisions because we will still retain the 35 representative districts, and there would be more justification that each of those districts should

have at least one, and then one for each 15,000 or major fraction thereof.

It may be a question of semantics whether you call them divisions or representative districts, except we would prefer to have them called divisions. You haven't convinced me of any strong reason why they should be
262 called representative districts.

MR. WILSON: Except that they are representative districts. That's the only argument we have.

MR. HARTNETT: He is a representative whether he comes from a division or a representative district. He still has one vote.

MR. POPPITI: I think it would be consistent to call them representative districts. Remember, our thought was in the beginning that we would start on the basis that each of the historical representative districts would continue to have one, but then within those districts, using this quotient, it would be subdivided into other districts. I think to be consistent you would have to call these representative districts.

MR. HARTNETT: I think if you divide them into new districts you are violating your traditional districts because you won't have 35 districts, you will have 45. Then you have lost your argument to the court as to why each district should have one.

MR. POPPITI: That doesn't necessarily follow.

MR. HARTNETT: If the court says why don't you combine your three lower districts and make it into one.

MR. POPPITI: They may well tell us that, but
263 remember, in our discussions here I thought we made it clear that if we started with the present 35 we would guarantee at least to those historical districts that they would have at least one with the opportunity to grow; but those that had already grown beyond this quotient that we would be using would get additional representatives.

MR. HARTNETT: I am not disputing that. I don't think it makes any difference what you call them. You can call them a sub-district of a district.

MR. O'DONNELL: You say it doesn't make any difference so long as we don't call them districts. That's what you are saying.

MR. POPPITTI: It makes a difference.

MR. HARTNETT: What's the difference?

MR. O'DONNELL: The difference is in growth.

MR. HARTNETT: That's right.

MR. O'DONNELL: We believe that when an area has this quotient, whatever it may be, it is entitled to a representative. You would graft them on in units of 15,000 to the whole, and you are growing within your representative districts individually. We are not making you grow as a whole because if we were, then we would wipe some of yours out right now.

MR. HARTNETT: That's right, and some of yours too.

MR. O'DONNELL: You wouldn't wipe ours out.

264 You would move them around, because we will have more under this system, no matter what you do. But you would be reduced if we moved yours around within it.

It seems to me that if we are going to have representative districts, if we are going to have the principle that a unit of population of 15,000 or major fraction thereof is entitled to a representative, then we have to have that principle and we can't say that in Kent County a representative represents a representative district, but in New Castle County we have a different system. You are sort of going back to a unit rule for New Castle County.

For instance, in Kent County if we followed you to a logical conclusion, we could just shift some of the 17,000 people from the Second District, which would soon be entitled to an additional representative if it has any growth. So that this same reasoning would apply to you.

MR. HARTNETT: The same reasoning would apply in that case. The Second District would be split into two divisions.

265 MR. O'DONNELL: But as our very large districts, 15,000, 30,000, 40,000 people reach the point where each of the subdivisions in that division has an additional 7,500 people, we feel they would be entitled to representation.

Now, the sooner, in my mind, that is done, the better. Another argument for it is that it will bring this whole picture into balance faster that way, because we would be adding my 7,500 by units.

MR. HARTNETT: You would be multiplying your additional representatives.

MR. O'DONNELL: But on the basis of population.

THE CHAIRMAN: I think perhaps the one distinction between what Mr. Poppiti and Mr. O'Donnell were saying on the one part, and what Mr. Hartnett is saying on the other part, is that under Mr. Hartnett's system the growth factor by which you would get an additional representative in the future would be a growth factor in the historic representative district as a whole.

Under yours it would be sort of a compound interest thing, if you broke them up into districts and each of those districts would have an independent growth factor which may result in compounding additional representatives in the future.

This is something that should be weighed in the point of view of whether or not it would be palatable to
266 Kent and Counties.

Each of the historic representative districts can tee off with the population factor in the beginning, and would have to evidence that growth within the historic district.

If you divide them into new districts, then each of those districts could compound it, and the added growth in the

rapidly growing areas could compound the number of future representatives that would come in.

MR. HARTNETT: Especially so when you have a major fraction.

THE CHAIRMAN: This is what I see as the major distinction.

MR. O'DONNELL: We are saying that if any district such as Brandywine, for example, were to be divided into four districts, it would take 7,500 people to get it over the 22,500 mark, and those 7,500 people would be entitled to a representative.

To my mind that is extremely logical and equitable when in your First District 6,084 people have a representative, and in the Third District 3,361 people have a representative, and so forth in the 3,700, 9,100, 2,600, 5,100, 4,900, and 4,900, plus one 7,800 classification. It seems to me to be absolutely logical for our 7,500 people to be represented by a person.

267 In fact, I think perhaps we are leaning over backwards to see that we have something accomplished here.

Now, you have one district with more than 10,000 people in it. You have all these districts I have just named where 3,700 people have a representative.

I do not see how Kent County in particular can object to 7,500 people getting a representative where you have the situations where 3,700, 3,300, 2,600 are getting a representative.

Now, true we have three districts that have less than 5,000, and we have five that have less than 10,000. So in part that reasoning is applicable to those. But out of your ten, you have nine that have less than ten. So that if your 3,700 people, and your 2,600 people are entitled to a representative, I don't see the logic that says our 7,500 people are not entitled to one, too, when these are on a population basis.

MR. HARTNETT: Our thought has been all along that from one to 15,000 people would get one representative. And from 15,000 to 30,000 you get two representatives.

MR. O'DONNELL: No, I beg your pardon. From 15,000 to 22,500. You get the second at 22,500.

MR. HARTNETT: Well, I have always disagreed with this idea of the major fraction, as you know. But just forget about it temporarily. Just for purposes of talking,
268 we will say 15,000 people for a quotient, and then you get a second representative at 30,000. If you had 30,000 population, you would still only have two representatives.

THE CHAIRMAN: Your compounding factor would amount to this under the proposal now coming from the gentlemen from New Castle County.

If you take an historic representative district, when it reaches 22,501 it would be divided, and if it were divided equally in the sense of a future growth factor, then you would have two representatives each representing 11,250, but with an equal growth factor when each of those had gotten 22,501, they would each be entitled to two. So that would mean that when the historic representative district itself had reached 45,000 under your system, they would have four. Under his system they would have three.

MR. HARTNETT: Well, I think we all understand the argument to that point. And, of course, the argument on the other point is that which I am sure we all understand, except Mr. Poppiti, who was not here, that it would affect the constitutional convention if we called them districts.

MR. O'DONNELL: We discussed that last night.

MR. POPPITI: Yes, I am aware of it.

THE CHAIRMAN: It was the only thing I was going
269 to point out, that unless you get back to Mr. Ernest Wilson's original idea, where he says that it will take place after the 1964 election, if a constitutional convention could be called, elected, and convened during the interim, and assuming that the same delegate strength would apply

on a representative district basis, this would be more palatable to the calling of a constitutional convention than one which provided for the immediate re-subdivision into other representative districts as is now proposed on the other hand before a constitutional convention could be called, elected, and convened.

Have I made that clear?

MR. O'DONNELL: I understand.

THE CHAIRMAN: It is a question of palatability again.

MR. O'DONNELL: I understand the reasoning.

THE CHAIRMAN: Now, please understand as far as I am personally concerned a constitutional convention called, elected, and convened on the old historic basis that is provided for in the existing Constitution to me is not only palatable, but I think it is something that I think is rather necessary.

On the other hand, I would find it extremely difficult to say that in my own mind one that would be called, elected, and convened after a redistricting would be at all palatable to Sussex County. Even though I, myself, think that
270 a constitutional convention, in my own mind, is necessary, my responsibility here is one of determining a plan which I feel would be acceptable and has some fair chance of having legislative approval.

MR. POPPITI: Well, of course, we may well conclude here that all we can accomplish is a solution to the immediate problem.

In our discussion in the main committee, there was a discussion with a view to having a constitutional convention because it was the general feeling that there were many other facets of our State Government that needed remedial action. But we may well conclude in our committee that all we can achieve is a prospective solution to the immediate problem, and may have to stop there.

THE CHAIRMAN: I think that is a fair statement.

MR. POPPITI: And that perhaps these other facets of our government that need correction may have to go

through this same procedure rather than through a general procedure which would obtain at a constitutional convention.

I would hate to see us deadlocked and not get beyond a solution which seems to have good prospects now because we can't perhaps come up with a broader solution.

THE CHAIRMAN: The only thing I have any great feeling about on the constitutional convention question is
271 the fact that I would like to see the people, acting through the constitutional delegates, have a say in this thing.

MR. POPPITI: I can see that, of course.

MR. E. S. WILSON: I feel that way, too.

MR. POPPITI: I understand.

THE CHAIRMAN: I think not only should the Court have a say in this, and the General Assembly, but I would like to see the people have something to say about this as directly as can be made possible.

MR. E. S. WILSON: And from a practical standpoint, I cannot see how these ten you are talking about could get in in time for a constitutional convention, because the constitutional convention would be passed on for the people to vote on in November.

MR. O'DONNELL: The referendum would be in November.

MR. E. S. WILSON: Then you elect in 1964 the delegates to the constitutional convention, and they do not convene until September of 1965.

THE CHAIRMAN: Well, you can retain the historic basis by substituting in place of your suggestion, the suggestion that redistricting not take place until after the election of 1964. Then the election would take place in 1964.

MR. HARTNETT: I sincerely believe that by 1965
272 there will be reapportionment in the House of Representatives, whether we do it by constitutional amendment, or the Court does it. I don't think the Court will wait until 1965.

THE CHAIRMAN: But will there be redistricting? This is the problem.

MR. HARTNETT: That is true.

THE CHAIRMAN: Or would they be elected at large?

MR. HARTNETT: But I think there are going to be additional representatives in the House after the 1964 election.

MR. O'DONNELL: If the Court should between now and September declare our constitutional amendment for the House of Respresentatives to be unconstitutional, then we would not like a two-legged amendment, or constitutional convention. All we need is a simple majority vote. Whether we could get that or not is a question.

THE CHAIRMAN: This is to my mind not a question of reapportionment. It is a question of when should the redistricting take place.

MR. HARNETT: I think you could make a strong argument to the Court if the constitutional amendment passes now, and then could be finally enacted in January. The Court might wait until January. But I don't think the Court is going to wait until 1965.

273 MR. KAVANAUGH: Unless you might have a built-in set of executing provisions, such as Mr. Ernest Wilson is speaking about.

MR. HARTNETT: No, you misunderstand what I am saying.

I say that in order to make the Court wait, I think there is going to have to be a constitutional amendment passed, I would say, next week. Otherwise it is my opinion that the Court would not wait, and would first declare our present constitutional provisions unconstitutional, and then would prescribe how it should be done. How, I don't know. Perhaps it would say the Legislature could do it by simple act.

MR. KAVANAUGH: And must do it by a certain date.

MR. HARTNETT: Yes, which was done in Maryland.

THE CHAIRMAN: Is it Michigan that says you must have it done by the 20th, or else it is an election at large?

MR. E. S. WILSON: Wisconsin. And now what they are trying to do is pass a joint resolution ignoring the Governor.

MR. O'DONNELL: I think they have already done it. I think they did it yesterday.

MR. HARTNETT: They did it once, and the Governor vetoed it. They did it again, and he vetoed it again. Now they are going to do it again.

MR. O'DONNELL: They didn't do it by resolution.

274 Now the question is, Can they do it by resolution to avoid the Governor's veto?

MR. E. S. WILSON: But the Michigan suggestion is senatorial distribution by population.

THE CHAIRMAN: That is right.

MR. E. S. WILSON: That is the difficulty in Maryland now.

THE CHAIRMAN: That is on appeal to the Court of Appeals in Maryland.

MR. POPPITI: Maurice, let me ask you a question. If we were just limiting ourselves to a consideration of the constitutional amendment, would you still have an objection to our forming new districts, preserving the historical districts as the basis, that is, preserving at least one vote to historical districts, to our forming new representative districts where the figures warranted such formation?

MR. HARTNETT: I would not object if the major fraction idea was eliminated. If it was strictly 15,000, I would have no objection.

MR. O'DONNELL: The other evening you and Harold Schmittinger were pretty close together in that line of thinking. Are you still pretty close together?

MR. HARTNETT: As far as I know. We were this

275 morning.

MR. O'DONNELL: So that we might not be too far afield if we concluded that his views were still as they were this morning?

MR. HARTNETT: That is right.

MR. O'DONNELL: We have not heard much from Sussex County on this matter.

MR. JOHNSON: Well, I have had a lot of calls, and the thinking seems to be along the lines of Harold Schmittinger's and Maurice Hartnett's suggestion. I am still of the feeling that we must come out of here agreed on both of these bills we are supposed to submit. I think if we come out divided, it won't be good for us.

If we eight cannot agree, how in the world can we expect the 35 and 17 to agree? If we can't get together, there is not much hope there, and then the Court is going to make the decision for us. That might be worse than what either of us would decide.

THE CHAIRMAN: Gentlemen, may I propose a compromise, to adopt your principle, but to apply it to an 18,000-factor? This would mean that when there has been 27,000 in a given representative district, it be split, each of those representatives representing 13,500. I understand the ideal for Delaware is 12,000-plus.

MR. POPPITI: Your quotient is 18,000?

THE CHAIRMAN: Yes. That would mean at 27,000, you would get a split. Divide that by 2, and each one would be representing 13,500. And I understand the ideal for Delaware is 12,000 per representative.

MR. O'DONNELL: Well, that 12,000 is just the present population divided by 35.

THE CHAIRMAN: Well, that is the only basis we have had to establish an ideal for the present and in the future.

MR. O'DONNELL: Well, I am quarreling with your language. "Ideal" to me means, "desirable." You are just using it as the mathematical result.

MR. E. S. WILSON: Yes.

MR. POPPITI: With an 18,000 quotient, has anyone computed how many additional representatives there would be?

THE CHAIRMAN: We had that worked out the other day.

MR. KAVANAUGH: Well, it would be somewhere between 10 and 6. We computed it on 20,000.

MR. POPPITTI: Was it 6 on 20,000?

THE CHAIRMAN: I think it was 7. We can do it very quickly, if you want to take your New Castle figures.

MR. E. S. WILSON: My objection to that is that
277 you are getting farther away from the 1,600 and the 27,000.

MR. POPPITI: Yes, the disparity is greater.

MR. E. S. WILSON: The disparity is increasing.

THE CHAIRMAN: Only up to the point of the split. After that your disparity would go right down to 13,500.

MR. POPPITI: Of course for physical reasons, this split that you envision could not come about. It might well be that in a given area you would have to preserve on district for that 15, or 18, whatever your quotient is, and set off the second district as a smaller district.

I could think of situations such as in Mill Creek Hundred, where I represent builders. If those areas grew, you pretty much have to set off one as the 15 or 18,000 people representative district, and permit the growth in an adjoining area, because if you split them one side would not grow. One side would not grow physically, because it might get backed up into an area where there couldn't be any growth.

THE CHAIRMAN: I know. But I would be assuming that for the purposes of discussion, at the very least if the committee that does this redistricting would do a good job, they should take into consideration growth factor, or else they they are doing a poor job.

MR. KAVANAUGH: Well, let me just by way of
278 clarifying my own thought processes say, as I understand it now, there are two things that we are talking about. This is the allocation of X number of additional representatives to New Castle County in order to attempt to equate a representation on a population basis.

The second thing is that we are dealing with 1960 census figures. It will not be until 1970 that we again have an official census which can be the basis for any readjustment,

reallocation, or redistricting, whatever you want to call it.

We do not have an official State census at any time in that decade.

THE CHAIRMAN: I agree.

MR. KAVANAUGH: Now, it seems to me we are overreaching ourselves in this area, if we do anything more than to provide for the immediate distribution of the X number of representatives for New Castle County on the basis of the 1960 census, because any projection figures that you use are not going to be official, and it will not be unitl 1970, at a time when the Commission which is called for in the proposed legislation will take over the responsibility of making this determination. And again it depends on how we write our proposed constitutional amendment as to whether we set a precedent for them to follow, which Mr. Hartnett is concerned about, and
279 which I think he has a legitimate concern, or whether they are going to act independently of anything that might be written into predetermined designations of supernumerary type of districts.

Now, to me what we are talking about in your supernumeraries is merely a stopgap measure to take effect as soon as it can be done, and only for so long as there is not another official dicennial census to use as a basis again for redistricting or reallocating whatever number of legislators for the Lower House are determined to be the fixed number, or an arbitrary number at any given time.

THE CHAIRMAN: Well, you understand what I am doing. This is merely a proposal that I am laying on the table, with an idea of trying to get unanimity among the members of the committee.

MR. KAVANAUGH: Yes.

THE CHAIRMAN: It is not a motion. It is just a suggestion, or an approach.

MR. KAVANAUGH: As far as I know, there is no motion before us.

MR. HARTNETT: There is one motion before us. Mr. Wilson's motion is before us.

MR. E. S. WILSON: I did not make a motion.

MR. HARTNETT: I thought you moved that additional representatives at large be elected at large in 1964.

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MR. E. S. WILSON: Well, if I did, I withdraw it.

MR. HARTNETT: Good.

MR. E. S. WILSON: We are not yet ready for a motion.

MR. HARTNETT: Well, Mr. Kavanaugh, you are saying the only plan we should work on will automatically end in 1970.

MR. KAVANAUGH: If what I understand to be the rest of the discussion so far is correct, that we are thinking in terms of a commission of three or five people who will redistrict, or reallocate every 10 years on the basis of an official Federal census.

MR. HARTNETT: But within the criteria we establish here, or a new criterion?

MR. KAVANAUGH: This is where I say the narrow point we have is the criteria to be used.

THE CHAIRMAN: That is right. And the implications of that criteria on the growth factors in the future.

MR. HARTNETT: Well, it makes a big difference whether we are talking about criteria we think are going to be permanent criteria of our constitution, or whether it is one we are only doing right now to take care of the problem until 1970.

MR. O'DONNELL: If it is adopted as a constitutional amendment, the committee could really operate

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within the framework of the constitutional amendment.

MR. HARTNETT: Quite right, unless the constitutional amendment says—

MR. O'DONNELL: That the criteria should be changed.

MR. KAVANAUGH: If we have concurrent legislation towards the constitutional amendment route, and the con-

stitutional convention route, I am perfectly agreeable to providing in the amendment to the constitution that anything that is in there with respect to increasing the number of representatives shall not in any manner affect the numerical designation of delegates, to wit, 41, in the other section of the constitution.

I think we can provide for that in the constitutional amendment, that it shall not affect another provision.

Perhaps if we could resolve that issue, we could take care of Mr. Hartnett's legal problem as to whether or not the question of increasing the number of representatives is going to have a legal effect on the other section which specifically calls for 41 delegates, and resolve some of our own doubts as to whether this should be left up in the air.

Now, what is the sentiment with respect to building into the constitutional amendment to Section 2, Article 2, a limitation or restriction that no other provision of the constitution will be affected?

282 In other words, I think if we express within the constitutional amendment itself the sense of the legislators in this particular amendment, I think the Courts would honor it.

MR. HARTNETT: Well, I think we would be much stronger with that in it, and I would certainly like to see a clause to that effect put in Article II, Section 2.

My own opinion as a lawyer is that might not necessarily be enough, because, as Frank O'Donnell stated last time, the rationale of Baker vs. Carr in and of itself might indicate that delegates to a constitutional convention would have to be elected on the basis of population. But I certainly think that we would be in a much stronger position to argue that the delegates to a constitutional convention would continue to be elected as they are now, and I would certainly concur in such a clause being put in there.

283 THE CHAIRMAN: Then this would leave only the question of the compounding factor.

MR. HARTNETT: Right.

MR. WILSON: I thought we had pretty well determined the 15,000 or major portion thereof before.

THE CHAIRMAN: That would be going back over old ground and I don't think it would be in order to review the whole picture.

MR. KAVANAUGH: We had a little side discussion back here. We were talking about the initial—

MR. POPPITI: About Wilmington, for example.

MR. KAVANAUGH: —split, if we could call it that, where you could carve a district which would have perhaps only 7,500 people in it for representative purposes. In that particular district it would have to grow until it reached 22,500 people before you would get another addition or another representative, before it would split again. If you preserve again the historical boundaries prescribed in the present Constitution for representative districts it is geographically and physically impossible for that type of growth to go on in one or more of the Wilmington representative districts which would be split in order to accommodate this particular adjustment.

THE CHAIRMAN: I have got another proposal which I will lay on the table, which would be this: that let
284 the growth factor—let the splits take place but let the growth factor apply to the historic representative district.

MR. O'DONNELL: As a whole.

THE CHAIRMAN: As a whole.

MR. O'DONNELL: I think you have got a mechanical problem there.

THE CHAIRMAN: You would still have your historic representative district and it would be a question of determining the growth factor.

MR. O'DONNELL: After the splits take place you don't have your historic district.

THE CHAIRMAN: Unless you preserve it for purposes of the growth factor.

MR. O'DONNELL: For instance in Brandywine Hundred you would have your first four on a split basis and that would result in four districts where there is now one and then you would say, "Henceforth for the next 75 or 100 people we will have that one running at large from the whole Hundred," so we would have a—

THE CHAIRMAN: No. The point I am saying is this: When the Committee has determined from the federal census that the growth factor in the entire historic representative district now entitles that district to five, then there would be a redistricting of the thing again from four to five.

285 MR. HARTNETT: What he is saying is that at the end of every census you would wipe out these subdivisions and start over again.

MR. POPPITI: This could be a real advantage. The point is this: In each of your subdivisions you would have enough growth and then if you pool their growth this would be a real advantage to the historic representative district.

THE CHAIRMAN: But you would lose this compounding factor.

MR. POPPITI: I think you would have a slower growth and a slower increase if you would apply this factor to the initial subdivision. For example, if you subdivided Brandywine Hundred into five districts and each of those districts had to grow by 7,501 before they would get one more representative, if we used your formula, each of them could increase by 1,501 and that would give them an additional representative.

THE CHAIRMAN: Let me go back to the formula I gave you in the beginning. The formula I gave you in the beginning: Let us take a representative district which is now entitled to one because it is under 15,000. It gets to 22,501 and then it is split into two. That would mean if it was split on an equal population basis and with an equal growth factor that each representative in the split districts would

be representing 22,501, at which time the old historic
286 representative district would be entitled to four because each of the two segments had grown to the point that it was again entitled to a split, so you get back to the historic. But that would mean 45,000, and the old historic representative district under the split system would be entitled to four. However, if you applied the growth factor to the entire district, 45,000 would entitle it to three. So at that particular point, you see, the old historic district, regardless of its internal subdivision, would have three under the growth factor applying to the whole district and would have four if the growth factor applied to the splits. This is the difference between the two. This is why I laid out the suggestion. This is why I am laying down this suggestion.

MR. KAVANAUGH: It is an excellent idea, Houston, for a mechanical redistribution on a periodic or every-ten-year basis. I think, however, that if you build into your system a separate commission which will be charged with the responsibility for redistricting then they should have some discretion. They wouldn't have any under this type of mechanical subdivision.

THE CHAIRMAN: Oh, yes. They would take that district, when it had reached 22,500 and they would split it in two.

MR. KAVANAUGH: At that point in my thinking that would be 11,250.

MR. POPPITTI: For each district.

THE CHAIRMAN: Correct.

287 MR. KAVANAUGH: For each division.

THE CHAIRMAN: Now, then, when it reached 37,501—

MR. O'DONNELL: It would be entitled to three.

THE CHAIRMAN: —it would be entitled to three.

MR. HARTNETT: What you are saying is that every ten years they would go back and look at the original historic districts and say, based on the formula, "You are entitled to 'x' number of representatives," and then they would redraw the—

THE CHAIRMAN: —the entire historic representative district into the new number of new representative districts that it was entitled to. Under their system, with these figures I have used, they would redraw it into four. Under the system that I am suggesting as a proposed compromise they would redraw it into three.

MR. O'DONNELL: It depends upon how the growth came.

THE CHAIRMAN: But the growth would be in the historic representative district.

MR. POPPITI: The only thing about that is that within ten years if a particular district had grown to say 7,000 and was 501 short of acquiring another representative when the dicennial census came out then you would lump them all together and that growth would be wiped out and they would start all over again. In effect, their 7,000 would be pooled with the growth within the historic district.

288 THE CHAIRMAN: That is right. In other words, my theory is this: If the Committee does a good job of subdividing it would necessarily have to consider the future growth factor as well as the future population. If at the end of ten years they misguessed on the growth factor they would go back and resubdivide it into three and again would have a second shot at the fair growth factor.

MR. WILSON: It penalizes new districts.

THE CHAIRMAN: I am trying to find a common meeting ground.

MR. WILSON: You can't tell how it would work. It depends on how the situation is in the ten-year periods. It might be more one way than it is the other.

THE CHAIRMAN: This is getting to be more and more of a science and I assume the Committee will avail itself of this scientific ability and if there was a misguess they would have an opportunity to review it every ten years and take another educated guess.

MR. WILSON: I don't think it is a major point one way or the other.

THE CHAIRMAN: Where it is major is only in the question of palatability to the General Assembly.

MR. POPPITI: As I see it now, in a broad general area—and let us take Brandywine Hundred, which is perhaps the most outstanding example—we only have one representative and under this system we would have four. At least every dicennial census if there were a growth it could be pooled and in that new growth area of representation you know at least that there would be an increase.

MR. WILSON: An increase of one or two.

MR. POPPITI: Of one or two. So I think it does have merit from that standpoint.

THE CHAIRMAN: It is a question of trying to cast about to resolve this thing.

MR. WILSON: Whereas, as a matter of fact, if you divided them into four, in 1970 none of the four might have reached that point.

THE CHAIRMAN: There is one other proposal that I have on this. There is always a temptation, whether it is resisted or not, on the part of any committee that does redistricting to do a little gerrymandering and this would review and possibly eliminate the gerrymandering or may throw it the other way.

MR. HARTNETT: That is a point.

THE CHAIRMAN: This is the point that impressed me.

MR. HARTNETT: The gerrymandering wouldn't last forever.

THE CHAIRMAN: No. You wouldn't be stuck with a gerrymandering that would last forever because you know the Committee would review that from that point of view and gerrymandering is something that is done and it is not a good practice.

MR. KAVANAUGH: The only trouble I have with that is that in preserving the historical representative districts, almost making them sacrosanct, I can understand and readily appreciate that it is mechanically feasible and

palatable and an easily-administered criterion or standard that comes within our initial concept of a rational standard that we talked about earlier in our first meetings. My own thinking on this whole subject, though, involves reapportionment and redistricting on a federal census basis across the board rather than just in the narrow confines of an historic representative district, wherever it may be located throughout the state.

MR. HARTNETT: I see your point and I think eventually sometime, some day it is true, the entire State of Delaware will have to be redistricted completely and totally, but I don't think we have gotten that far yet.

MR. WILSON: We might be closer to it than you think.

MR. HARTNETT: We hope we haven't gotten that far yet. Our thought has been so far that we would maintain them. I can see where, as I have said once before, the General Assembly would reach such a size that there would have to be a re-evaluation of this whole concept in order to keep the General Assembly — the size of the General
291 Assembly within bounds. Then it might be necessary to change the quotient and consequently change all the district boundaries, but until such time as the General Assembly reaches a size which is unmanageable then I think this formula would probably be as fair as any.

THE CHAIRMAN: Of course, this is one of my bases for feeling that I would rather see the redistricting, which is inevitable, done by a constitutional convention which is at least a little bit more remote from the political arena than being done by the General Assembly. I don't think that we should or could reasonably ask this General Assembly to start doing some redistricting. We would be presenting something to them they would never never solve.

MR. HARTNETT: I don't think that this Committee could redistrict the State within the next week. I know the General Assembly could do it. We could do it but it would just be close your eyes and—

THE CHAIRMAN: But the General Assembly would never take anything that we said. I am sure of that. Because that is so purely political that I couldn't feel that we would be doing anything but wasting our time.

MR. KAVANAUGH: Echoing your sentiments, Mr. Chairman, I would like to restate them along the lines again of a companion legislation, one along the lines of the Constitutional amendment of Article II, Section 2, and the
292 Constitutional convention, for these very reasons that have been under discussion here. We are now in our third session and we have not been able to resolve our own thinking, even on a purely philosophical plane, as to how to approach this subject. I think this is an issue which is critical for any constitutional convention. I think the Legislature is too close to it. From a selfish self-interest standpoint they would have more of a problem certainly than we are faced with now. As far as the amendment to the Constitution is concerned, I think we need it immediately as a stopgap measure and I like what has been talked about earlier, without getting into the niceties of how re-districting will be done in '66 or '68, because I would like to see a Constitutional call which would take place in September of 1965.

THE CHAIRMAN: Well, sir, this is my fundamental reason the last time for having cast a vote against so-called re-districting in any phase and having them elected at large, period, and then as a companion to that have a Constitutional convention, which I would anticipate would have to hit this redistricting problem and we would just stay off it entirely and just say the tentative basis to do something in good faith, which the court we hope will accept, is action in good faith to let them them be elected at large, period; to say nothing about redistricting. And then as a companion to that have a Constitutional convention which we could say in our report would attack the problem of
298 redistricting, as remote a position from partisan politics as could be done. This is the basis of my voting that way.

This also would get us away from this compounding factor, as far as the work of this Committee is concerned, and leave that again to the Constitutional convention. This would seem to me to eliminate the elements that seem to divide us in our discussions, at least at the present time.

MR. HARTNETT: I think we are getting ahead of ourselves again. I think we are going to have to resolve this question of how we are going to divide the present representative districts of New Castle County.

THE CHAIRMAN: Would you go for letting them be elected at large, period?

MR. KAVANAUGH: Within the historic—

THE CHAIRMAN: Within the present historic districts, period.

MR. WILSON: Provided you have a Constitutional convention?

THE CHAIRMAN: Of course, all of us would reserve our look at the whole plan. In other words, if ultimately this Committee did not go for a Constitutional convention then I would assume from your points of view when you exercise your reservation of looking at the whole plan you would say "no soap" on the whole plan. We have got to
294 go back over it again if we don't get a Constitutional convention as a companion to this.

MR. O'DONNELL: No. I won't say that.

MR. KAVANAUGH: As far as at-large elections are concerned, I don't know of anyone who is on record more frequently and more often than I am with respect to the invidiousness of at-large elections insofar as it pertains to the City of Wilmington. I am perfectly agreeable to a plan which would call for at-large elections for the supernumeraries of the historical representative districts insofar as they pertain to Wilmington and obviously insofar as they pertain to rural New Castle County, if it is done for not more than two general elections, namely, 1962 and 1964, and further provided that there is an immediate call for a Constitutional convention which can take place

no later than September of 1965, at which time this whole issue of Article II, Section 2 will be considered de novo.

I can't put my views or feelings or sentiments or words in any more succinct language than that and if you can transcribe it I would like to have it repeated every ten minutes.

Mr. O'Donnell: Just to summarize so we don't waste any more time on this, I can't be as agreeable as Mr. Kavanaugh and I would not vote for at-large elections at any time.

The Chairman: Even for one?

Mr. O'Donnell: Even for one. If that is what I was in favor of I would have just let the court go on
295 with their possibly ordering the same and not have spent my time on this subject. I believe that we should decide on a system of redistricting, recommend it to the overall Committee, and let the proper legislative committee work out the details as to how the line shall be drawn for these new districts. I also believe that once these districts are created that the inhabitants of these districts stand on the same plane and have the same rights as the inhabitants of any of the present districts in Kent County.

I am willing to recognize your districts in Sussex County, by the way. I am willing to recognize your districts now. I am not asking that you give up your historic representation in each of these districts. If each of those districts has a representative—I can see in Sussex County, in many of your counties you are getting up there in population. Your tenth has 12,359; your first has 98; your third has 94; some have 88,000. I can got along with maintaining those, but I think that from this moment forward ours should be on an equal status with yours and I think that any growth that you have over 15,000 should be recognized and that any growth that any one of our districts has over 15,000 should be recognized.

The system which I am willing to go along with has from the beginning certain inequalities. Based upon a mathematical ratio, Kent County should have 150,000
296 people to justify 15 representatives and it has 66,000. So that you are getting a tremendous advantage or you are getting a tremendous bonus momentarily from this Committee, if I may say so, if the plan we had discussed should be adopted. Sussex County has 76,000 people and they are getting enough representatives that would justify a figure of 150,000 people.

So that I can't see why, with the tremendous advantage you are getting, as I see it, you believe that it would be inequitable to redistrict our growth, which we are only asking for growth based upon actual growth. You are getting representation now based on people that you don't presently have and you might not have, based upon your historic growth, for some time.

As a compromise I am willing to go along with the status quo for your present districts but I think that you should go along with us and recognize our future growth which we claim we may have. If we don't have it we wouldn't pick up any additional representatives. We are only asking for representation for people who might be in being in the future. If for reasons unknown to me Brandywine Hundred stops growing, and it might, Christiana Hundred, then we might not get any additional representation there. But if we have additional people then I believe that our additional people would be entitled to representation.
297 You are starting out with tremendous representation for people you don't presently have and we are asking in exchange for that—not really in exchange for it but as a companion to it that we be given representation for people who may exist in the future and we are asking it only if those people come into being and are there and are counted in the general census in the future. I personally feel that if this is going to be adopted by a majority vote

of the legislature after the court speaks, I feel it should be along those lines. If it is a Constitutional amendment I feel it should be along those lines. I think it should be palatable to your people because you are getting quite generous representation and you are getting your geographic representation in the Senate.

So that we would have 25 people representing 350,000 people and you would have 10 people representing 66,000 people or 76,000 people. So I am afraid that my position on this thing, after thinking about it and after meeting with some of our people and meeting privately with some others, is that we just have to—at least I do—insist on representation based upon—

THE CHAIRMAN: Let me say this: Your present thoughts on the subject are not too far apart. I think that Sussex County can be persuaded to accept—this is my belief. I may be wrong.—will be willing to accept a 15,000 growth factor. However, when it is clearly explained that
298 under the proposed redistricting there is a gimmick in this and the gimmick is that there will be a compounding growth factor through your proposed redistricting.

MR. O'DONNELL: Not really. Only based on people. There is no gimmick. We don't ask for any representation on people that won't exist.

THE CHAIRMAN: Let me just finish. What I am trying to say to you is how I think that Sussex County will look at it because you know they have been viewing this thing on a growth factor basis. This has been the publicity. This redistricting with a compounding growth factor is not clearly understood and of course it must be clearly explained and understood by them and this is one thing that concerns me.

We are only apart in this: whether the growth factor shall apply to the historic representative districts as a whole rather than to the new districts or subdivided districts. Let me again say this: If the growth factor is

limited to the historic representative districts that will apply equally throughout the State and, by the same token, if Sussex County took a sudden growth or if an area such as Dover in Kent County took a sudden growth, its number of representatives, based on the growth factor, would be equated with yours. They would still have to retain their historic representative districts. So in this sense of the word retaining the historic representative
299 districts for the application of the growth factor would apply equally to our potential as it would apply to your potential. And so there is nothing inequitable about this, in my mind.

Second, let me say this: that this would give a chance for the redistricting committee to take another look at this thing every ten years and if they have misjudged a subdividing for the past ten years on how the growth developed this gives them a chance to review it in the light of new information. Third, if any redistricting committee should yield to the temptation of gerrymandering after one census then every ten years the possibility of eliminating that gerrymandering and wiping out that temptation to which they bowed would be afforded another redistricting committee.

It is for these three reasons that I think that this is a common meeting ground where we can get together and I would be perfectly willing myself to meet you on this particular ground and then let the Constitutional convention stand on its own feet and decide that later.

MR. POPPITI: I think your approach is a logical outgrowth of our initial premise to preserve the representation for the historical representative districts because if we start with that major premise then it would seem that your proposition and your suggestion would follow: namely, that within that representative district,
300 when it achieved a population of 15,000 or the next major fraction it would be entitled to an additional representative. Then if you said that after each federal

dicennial census you would re-examine each of the districts, then, in effect, you would not be penalizing growth in the original subdivided districts.

THE CHAIRMAN: This is what the federal system is as far as the House of Congress. They redistrict the entire state. This is another factor. This would be following the federal precedent, which I think should have some appeal to the court.

MR. POPPITI: I think it has merit. I think the New Castle County delegation might want a caucus after a little recess because it is a new approach to the problem.

THE CHAIRMAN: Gentlemen, it is almost six o'clock. We can very shortly recess for dinner. This will give you a chance to think this over. Do you want to recess now, gentlemen?

MR. WILSON: Let us recess now and go down and eat.

THE CHAIRMAN: We will recess for dinner at the present time. I think we clearly understand the problem and I don't see that any further discussion is going to help us very much unless we come up with some new ideas.

(At this point the meeting recessed for dinner.)

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301 (The meeting reconvened at 7:30 p.m.)

THE CHAIRMAN: Let us report another agreement. We will let Kent County report on their division.

MR. SCHMITTINGER: We have agreed on the same kind of division that Sussex has, an east-west division. Unfortunately, the representative districts are numbered differently so it doesn't look like it is similar, but it is an east-west division and it would be for the Sixth at-large. It would be the First, Second, Fifth, Seventh and Eighth Representative Districts, and then the number Seventh at-large would be the Third, Fourth, Sixth, Ninth and Tenth.

THE CHAIRMAN: Do you propose the identical resolution for Kent County with these numbers as was proposed for Sussex?

MR. SCHMITTINGER: I do.

THE CHAIRMAN: Do I hear a second?

MR. HARTNETT: I second it.

THE CHAIRMAN: Any discussion? If not, all those in favor signify by raising their right hands? Contrary? It is unanimous.

Was there something left dangling on that that would tie in to both of them or did we get that in?

MR. HARTNETT: You got that in already.

THE CHAIRMAN: I guess we are waiting for New Castle County to tell us how they feel about my proposed
302 compromise that was laid on the table.

MR. O'DONNELL: As I understand it, at least the four of us are in agreement with our understanding of the proposed compromise, which, as I understand it, is that each of our representative districts where more than 15,000 people reside will be divided into as many representative districts as are required to bring it as close to a 15,000 population as possible and that in the future—and this is where we accede to one of your thoughts—that in the next dicennial after the—after the next dicennial federal census that the present representative districts will again be subdivided into as many representative districts as may be required, using 15,000 or major fraction thereof as a quotient as applied to the present representative districts. That is contrasted with your previous position where we were applying the reapportionment to each new representative district. We are acceding to your thoughts. Each historical hundred will be analyzed after each dicennial census and divided into as many representative districts as are required by a quotient of 15,000 or major fraction thereof.

THE CHAIRMAN: You have caught my own understanding of the proposal as I made it.

MR. POPPITI: I suppose the only prefatory remarks he might have made are that we as a Committee are now pre-

serving the historical representative districts as the
303 units from which to determine—

THE CHAIRMAN: To which to apply the quotient.

MR. POPPITI: That is correct.

THE CHAIRMAN: And this applies throughout the entire state.

MR. POPPITI: The entire state; that is correct.

THE CHAIRMAN: And that is the only purpose for which they are being retained.

MR. POPPITI: And that this would be reviewed after each federal dicennial census.

MR. O'DONNELL: It is my recommendation, which I have not discussed with anyone else, that for example in Brandywine Hundred after this job is accomplished, we would have the First Representative District of Brandywine Hundred of New Castle County, the Second Representative District of Brandywine Hundred of New Castle County, et cetera. Then in 1970, if the population of Brandywine Hundred has gone up to 67,501, for example, we would then have five representative districts of Brandywine Hundred, numbered consecutively, beginning with 1.

THE CHAIRMAN: Do you propose as soon as the Constitutional amendment becomes effective that the Constitutional Reapportionment Committee shall immediately apply it throughout the entire state for the 1964 election?

MR. POPPITI: I would think so.

304 MR. WILSON: Yes.

MR. POPPITI: This is contrasted with your former position.

MR. WILSON: Yes, with my former position.

THE CHAIRMAN: In other words, this would provide for a reapportionment committee by Constitutional amendment and that committee would act at once throughout the state—

MR. POPPITI: To implement the Constitutional amendment.

THE CHAIRMAN: For the '64 election and thereafter every dicennial. I am not putting words in your mouth.

MR. O'DONNELL: This is a time element. I would have preferred that legislation to be introduced to amend the Constitution now, spell out the present bounds of the new districts, the new bounds and the Committee do it in the future so that the new districts could be described in the new legislation.

THE CHAIRMAN: In other words, we would go into redistricting right now.

MR. O'DONNELL: Not "we." If the major Committee approves.

MR. WILSON: I don't think even the major Committee can do it in time.

MR. SCHMITTINGER: Why does it have to be done that soon, Frank?

THE CHAIRMAN: This is just a suggestion: that
305 the Reapportionment Committee provided for in the Constitutional convention start to operate at once to do it.

MR. POPPITI: Of course, there might be a question that none of us has examined. Would it be constitutional to amend the Constitution to then delegate the original districting to a redistricting committee? I don't know. I haven't thought that through.

MR. HARTNETT: A lot of state constitutions delegate to—

MR. POPPITI: Do you follow me?

THE CHAIRMAN: Yes.

MR. KAVANAUGH: I think you can provide that it will be done by legislation by the statutory route. I think it can be done constitutionally.

THE CHAIRMAN: In other words, what you would be empowering them to do, you would be preserving the historic representative districts. You would be empowering them to apply the population quotient within the district to reapportion and to redistrict the historic districts.

MR. WILSON: I would prefer that to be done by a reapportionment committee rather than try to do it between—

THE CHAIRMAN: This would avoid a lot of argument in the legislature, I think.

MR. WILSON: Yes.

THE CHAIRMAN: Has anyone else any thoughts on that?

306 MR. KAVANAUGH: This would be in a sense a constitutional or a legislative commission. In other words, it would be provided for expressly in the Constitutional provision.

THE CHAIRMAN: Yes; who the committee would be.

MR. WILSON: Who the committee would be, yes.

MR. O'DONNELL: As in some of the bills, such as Mr. Wilson had here the other day.

THE CHAIRMAN: The five-man committee, the three-man committee.

MR. WILSON: The Governor, the Attorney General and the Chief Justice. Another one is the Governor, the President of the University, the President of the Farmers Bank and the leaders of the two political parties, I believe.

MR. POPPITI: And as a practical matter, this committee can't function until after the '62 election anyhow because the first leg presumably would be voted on now, so the political complexion of that committee is subject to this election, anyhow.

MR. KAVANAUGH: It is up to the electorate.

THE CHAIRMAN: It wouldn't even be in being until after the Constitutional amendment.

MR. KAVANAUGH: By way of further extension of those remarks, conceivably it would only function for the 1964 election, on the theory again, just speaking by way of extension of remarks, that the Constitutional convention is convened in September, 1965, and is able to come
307 up with something for the '66 election.

MR. POPPITI: That is possibly right, yes.

MR. KAVANAUGH: This is a possibility.

MR. POPPITI: They may elect to go another route for the whole process.

THE CHAIRMAN: One other question before we get to the Constitutional convention. Do you want this amendment to provide that any such redistricting of the historic representative districts will not affect the apportionment of the delegates or the number of delegates to any Constitutional convention, pursuant to the Constitutional convention clause of the Constitution?

MR. POPPITI: Yes. This is our feeling, too, because we are very anxious to have a Constitutional convention and it is the feeling of our northern delegation that we would "take our chances" in a Constitutional convention constituted as presently set out in the Constitution.

THE CHAIRMAN: This was the thinking of let me say not all of the representatives from Sussex County but it at least was vocally expressed by a number of them who were at the meeting that they would take their chances on the Constitutional convention with the existing. They thought they could out-talk you from New Castle County. I think this will probably be made known to the legislature, that this chance exists, but we are not here
308 to weigh or assess that. We are here to weigh or assess what the court is going to do about the General Assembly.

MR. WILSON: Could we discuss then the composition of the reapportionment committee?

MR. HARTNETT: Let us take one step at a time.

MR. O'DONNELL: We haven't adopted this.

THE CHAIRMAN: Does anyone from New Castle County want to try to phrase this resolution for us? This is just for the Secretary's minutes. Do you want to undertake it, Frank?

MR. O'DONNELL: "RESOLVED: that all representative districts in all counties shall be apportioned on the following basis: that any of the present 35 representative dis-

tricts having a population greater than 15,000 shall be divided into representative districts which shall be known as the 'First,' 'Second,' et cetera representative districts of the hundred in which they are located and for each additional 15,000 population or major fraction thereof additional representative districts shall be established."

MR. POPPITI: For this purpose don't you want us to agree on a resolution embodying the principles to which we are going to apply and then somebody be instructed to draft the Constitutional amendment?

MR. O'DONNELL: That is what I was trying to do. I wasn't trying to draft the statute now.

309 MR. SCHMITTINGER: One thought on that is that some of our representative districts aren't hundreds. We have parts of hundreds. I guess the City of Wilmington is the same way.

MR. O'DONNELL: That's right.

THE CHAIRMAN: We have to distinguish them by historic representative districts as opposed to the use of the word "hundreds."

MR. O'DONNELL: Otherwise, was it right?

MR. POPPITI: Yes, I think so.

MR. HARTNETT: I could read this whole thing. Do you want me to read this whole one big paragraph?

MR. O'DONNELL: No, because it incorporates the parts we adopted the other evening.

THE CHAIRMAN: May I take a crack at this?

MR. O'DONNELL: How did you write it down?

MR. HARTNETT: I just wrote this whole paragraph.

MR. O'DONNELL: I have it done on a fractional basis.

MR. HARTNETT: "Upon any representative district being entitled to more than one representative, the representative district as now set forth in this Constitution shall be subdivided into a representative district for each new representative and there shall be a representative district for each representative, from which shall be chosen

by the qualified electors of the representative district
310 a representative. After each official dicennial federal census the new representative districts created as a result of the application of the quotient shall be abolished and the representative districts as now set forth in this Constitution shall be redivided as set forth herein.''

Is that what we have in mind?

MR. O'DONNELL: It sounds pretty close.

MR. KAVANAUGH: Except that it injects still another possibility and that is where you get a dilution of your population. We are thinking now in terms you know of increases in population, but as you have worded this—

MR. HARTNETT: It wouldn't make any difference.

MR. KAVANAUGH: Yes, it would.

THE CHAIRMAN: You would go back to one.

MR. KAVANAUGH: That's right.

THE CHAIRMAN: This would be right.

MR. POPPITI: Sure, because basically haven't we decided that we are going to use the 35 historic representative districts? Each district shall be entitled to at least one vote but, applying a quotient of 15,000, each district shall be entitled to such additional representatives as shall be represented by dividing the total population after each dicennial census by 15,000 or a major fraction thereof. Isn't that what we have agreed on in principle?

THE CHAIRMAN: Yes.

311 MR. POPPITI: Somebody has to draft this into a Constitutional amendment. Can't we have a vote on that, on these principles which we have agreed on?

THE CHAIRMAN: Yes. I think the record is clear on the principles we have agreed on and somebody move that we adopt these principles.

MR. POPPITI: I so move.

MR. KAVANAUGH: Seconded.

THE CHAIRMAN: All those—any further discussion? If

not, all those in favor signify by raising their right hands. It is unanimous.

(Discussion off the record.)

MR. POPPITI: We have agreed on seven Senators from each county, on a geographic basis; we have agreed to preserve the historic senatorial districts in New Castle County; we have agreed to preserve the historic senatorial districts in Kent and Sussex Counties and have set up two additional districts in each county on a geographical basis. We have then agreed to preserve the historical 35 representative districts, giving them a minimum of one vote per district; we have set up a quotient of 15,000 or major fraction thereof as the determining factor for each additional representative and we have further indicated that this is to be reviewed after each federal dicennial census.

THE CHAIRMAN: To be reviewed first immediately after the Constitutional amendment becomes effective and thereafter following each dicennial federal census.

MR. POPPITI: That's right.

THE CHAIRMAN: We have also agreed that this will not affect a Constitutional convention.

MR. POPPITI: And that after each dicennial census each historic representative district shall be re-examined and be redistricted accordingly, whether there be an increase or decrease in population.

THE CHAIRMAN: And we have agreed that this amendment will not affect the—

MR. POPPITI: Put it positively, Houston. Why don't you say positively it is the agreement here that the delegates presently provided in our Constitution for a Constitutional convention shall remain the basis for a Constitutional convention.

THE CHAIRMAN: Right.

MR. SCHMITTINGER: Isn't the only thing remaining then the question of who is going to redistrict? Whether is it

going to be a committee or a commission or the legislature, and so forth?

THE CHAIRMAN: We have also agreed that the first Senators to be elected from the newly constituted senatorial districts in both Kent and Sussex Counties, those coming from the Sixth shall be for two years and thereafter four years and those from the Seventh shall
313 be for four years and continuing.

MR. KAVANAUGH: Does the language of that Section 6 help you with respect to your delegates?

THE CHAIRMAN: Yes, for purposes of substance. We have agreed that nothing contained in this foregoing plan shall be construed to affect the number and composition of delegates to a Constitutional convention provided in Article VI, Section 2, being expressly understood that there shall be 41 delegates allocated as therein provided.

Are we agreed on the substance of the review to date? If so, we will continue on to the question of a reapportionment committee and its composition.

MR. WILSON: I have two bills here, one of which suggests a reapportionment commission of five members, consisting of the Governor, the Senate majority leader, the Senate minority leader, the President of the University of Delaware and the President of the Farmers Bank of the State of Delaware.

I have another one here in which the proposal is that there be apportionment by the Governor, the Attorney General and the Chief Justice of the State Supreme Court. The Governor shall act as Chairman of the reapportionment commission and the commission shall fix its own rules and procedure.

THE CHAIRMAN: What is that first one again?

MR. WILSON: The first one is a reapportionment
314 commission of five members consisting of the Governor, the Senate majority leader, the Senate minority leader, the President of the University of Delaware and the President of the Farmers Bank of the State of Dela-

ware. The Governor shall act as Chairman of the reapportionment commission and the commission shall fix its own rules and procedure.

THE CHAIRMAN: That is the Senate minority and majority leaders?

MR. WILSON: The Senate majority and minority leaders.

THE CHAIRMAN: What do you think of the president pro tem and the Speaker of the House? Somebody in the House is going to get indignant.

MR. WILSON: Then you might have all of one party.

MR. POPPITI: I would rather see a combination of these two plans.

THE CHAIRMAN: I would like to see the Chief Justice in place of the President of the Farmers Bank. I don't see where he has anything to do with this.

MR. POPPITI: Very good. You read our minds on that.

MR. HARTNETT: My only objection to the Chief Justice would be, are we going to provide a method of appeal and, if so, it would be I would think to the Delaware Supreme Court.

MR. O'DONELL: There is a line of decisions which our Chief Justice and the members of the Supreme
315 Court are acquainted with and are quite in sympathy with that restricts the duties that can be put on the judiciary and they are unhappy about additional nonjudicial duties. There are nonjudicial duties which they don't want and which I feel they shouldn't have. I feel this is one they shouldn't have.

MR. POPPITI: I would like to suggest a reapportionment commission consisting of the Governor as a Chairman, the president pro tem of the Senate, the Speaker of the House, and the Chairman of each major political party.

MR. O'DONNELL: How about the Governor, the majority leader, the minority leader. I think it ought to be bipartisan?

MR. WILSON: So do I.

MR. O'DONNELL: The Governor, the majority leader, the minority leader—

THE CHAIRMAN: Of which house?

MR. O'DONNELL: Of both houses. That would give you five.

MR. HARTNETT: I personally am against putting on the majority and minority leaders of the house because I have seen some of the men who have been majority leaders; not at the present time and not within the last few years. However, I don't think these men by training are suited for this type of job.

MR. O'DONNELL: That is what they have legislative attorneys for.

316

MR. HARTNETT: I would prefer to see—give the right to the chairman of each political party to appoint one or two persons to represent that political party.

MR. O'DONNELL: There you get into another delegation, the constitutionality of which might be in question.

MR. HARTNETT: That is true.

MR. O'DONNELL: I think the delegation of authority has been the source of considerable difficulty.

MR. KAVANAUGH: Just for discussion, is there a need to discuss the majority and minority leaders of the Senate since we are talking about reapportioning only the House?

MR. HARTNETT: I agree there. It probably should be confined to the House.

THE CHAIRMAN: You thought, didn't you, that the House was the patient and these were the doctors?

MR. HARTNETT: Of course that is true. It might be better not to have your own self-interests.

MR. KAVANAUGH: What you are doing is you are working yourself back to the three-man commission of the Governor as Chairman, the Attorney General as one of three members and the Chief Justice of the State Supreme Court. I personally feel that I would rather not add to the duties of the Chief Justice of the Supreme Court by

317 giving him a Constitutional appointment to such a committee. I think we ought all to agree on the Governor serving as the Chairman of the committee and proceed from there, Mr. Chairman.

THE CHAIRMAN: All right. Let us take them one at a time. The Governor is agreed upon. I won't call for a vote on that. Let us take the Attorney General. Do we want him on it? Let us discuss the Attorney General now.

MR. HARTNETT: You have got to keep this as bipartisan as you can.

318 THE CHAIRMAN: Do we agree in principle that there ought to be two representatives of each of the two major political parties?

MR. O'DONNELL: At least two. Would it be easier if we started as to how many people do we need?

MR. WILSON: Maybe you only need three.

MR. POPPITI: Why not the Governor and the chairman of each major political party?

MR. SCHMITTINGER: Or their nominee.

MR. POPPITI: No, I don't think we had better have the nominee. We have had trouble with that.

MR. O'DONNELL: We have had at least one Election Department case where the power to name the members was delegated. I would rather stay away from this delegation.

THE CHAIRMAN: You think he ought to be an official.

MR. SCHMITTINGER: The Governor and the chairman of each of the two major parties. Let's leave it at that.

THE CHAIRMAN: It's a factual thing. Of course, the redistricting itself is not factual. That is quasi-political.

MR. POPPITI: This is where we might live with gerrymandering for four elections. This is the only danger if we have the two chairmen and the Governor; it will be a 2 to 1 vote.

MR. WILSON: Wouldn't it be better to have two
319 people from the Senate, the Senate majority leader and the minority leader?

THE CHAIRMAN: That would be the president pro tem and the minority leader.

MR. KAVANAUGH: Put yourself in the place of the president of a house of representatives. They don't want the Senate telling them what to do.

MR. SCHMITTINGER: Mr. Chairman, one of these bills, No. 361, which you have all probably read, spells out the standards that this commission must apply:

1. Each district shall be formed of contiguous territory and shall be as compact an area as possible.

THE CHAIRMAN: That is the gerrymandering thing.

MR. SCHMITTINGER: I think we could get around that if we spell out the standards.

MR. HARTNETT: It would help.

MR. O'DONNELL: Within any phraseology there is certain room.

MR. POPPITI: This has its limitations too, Frank. There are certain built-in limitations.

MR. WILSON: You would rather have the political party chairman?

MR. O'DONNELL: I originally had thought that
320 perhaps it would be advisable to have the Senate do this, but it seems to me that—could we go off the record, Mr. Chairman?

THE CHAIRMAN: Yes.

(Discussion off the record.)

MR. POPPITI: Should we have three or five people?

THE CHAIRMAN: I am inclined to five on the theory that two heads are better than one.

MR. POPPITI: If there has got to be five, we are agreed on one. We agree that the Governor should be the head.

MR. KAVANAUGH: If you are going to five, I would buy the incumbent chairmen of the two major political parties as they exist in the state at that time.

MR. POPPITI: Now then, we need two others. Who shall they be?

MR. O'DONNELL: I haven't done too much research on this.

MR. KAVANAUGH: Could we agree that it would not be the Chief Justice of the Supreme Court?

THE CHAIRMAN: I think so.

MR. POPPITI: I don't think it ought to be the Attorney General, either. They ought to be left out because there may be appeals.

MR. SCHMITTINGER: What's the objection to having Superior Court judges?

321 MR. POPPITI: For the reason that Frank suggested. They would like to stay away from these political jobs.

MR. SCHMITTINGER: But I think the impartiality there would be as sure as you could make it.

THE CHAIRMAN: There is another factor involved there, and that is that you wouldn't want such a judge who is appointed and confirmed by the Senate to be subjected to any internal feeling about this thing when his appointment is just coming up. I think this could put him in an embarrassing situation.

MR. O'DONNELL: And undesirable pressures.

MR. HARTNETT: That's why the judges don't like it.

MR. POPPITI: That's right, because if we are going to use the judges we should consider using the boards of canvass. They could also sit as your redistricting committee, but I don't think this is fair to the judiciary. It's a political thing.

THE CHAIRMAN: Redistricting is going to have political overtones no matter what you do.

MR. POPPITI: That's right. Our judges in Delaware, once they are elevated to the bench, stay away from politics, and I think we ought to keep them there.

MR. O'DONNELL: And in some states, such as Maryland, the reapportionment litigation has been in the state courts, and perhaps it should be here, in the first instance.

322 THE CHAIRMAN: That is on motion now, isn't it?

MR. O'DONNELL: No; it hasn't been raised. You mean in Delaware or in Maryland?

THE CHAIRMAN: Has a motion to that effect been made here?

MR. O'DONNELL: No. The Kent County lawyers have talked about it but there is not a motion.

THE CHAIRMAN: I thought there was.

MR. O'DONNELL: At least I haven't noticed it.

MR. POPPITI: Well, can we stop at three? Harold Schmittinger suggests why don't we stop at three: the chairman of each party and the Governor.

MR. O'DONNELL: Each major political party.

MR. POPPITI: Yes.

MR. O'DONNELL: I think it should be phrased in terms of the chairmen of the two parties who had the largest vote in the last general election. That will eliminate the Prohibitionists and other such groups.

MR. POPPITI: What is the feeling around the table?

MR. WILSON: I would think three.

MR. SCHMITTINGER: What would happen, as a practical matter, is that the two chairmen would appoint a subcommittee, probably a committee like this.

MR. POPPITI: Who are the people in our state who
323 are handling these figures? The Department of Elections?

MR. O'DONNELL: The Department of Elections.

MR. POPPITI: Should those people be included?

MR. WILSON: You are talking about population?

MR. POPPITI: We don't have any agency concerned with that, do we?

THE CHAIRMAN: That is a Federal agency.

MR. WILSON: You could make the State Planning Director part of this. The State Planning Director is going to get into this population thing very shortly.

MR. KAVANAUGH: May I ask a question? Do we have in the state some sort of a quasi-permanent type of depart-

ment who assumes permanency yet it is an independent type, state-wide officer?

MR. WILSON: The State Archivist.

MR. HARTNETT: He would die.

MR. O'DONNELL: I think this thing should be equally divided as nearly as possible between the two political parties. Once you swing into offices outside of the political make-up, you don't know what will happen.

MR. HARTNETT: One thing, the one party head can't bring pressure on the other.

MR. KAVANAUGH: Do you think we will have a cabinet form of government by then?

324 MR. O'DONNELL: Not in time.

MR. POPPITI: Actually, we are addressing ourselves to the first step in the reapportionment, because something may well occur to the constitutional convention and that group might come up with an entirely different machinery.

THE CHAIRMAN: This is prong number 1 of the pitchfork.

MR. POPPITI: That's right. We are working only with the immediate future.

MR. WILSON: That's right. Just leave it with three.

MR. POPPITI: I would think with a three-man commission we would be all right.

MR. SCHMITTINGER: I will make that motion, Mr. Chairman, that the Governor and the state chairman of the two parties receiving the largest vote in the last general election constitute the commission.

THE CHAIRMAN: In the last preceding general election.

MR. HARTNETT: For what office?

MR. O'DONNELL: Say for the office of Governor.

THE CHAIRMAN: Yes.

MR. POPPITI: I second the motion.

THE CHAIRMAN: Wait a minute; the last preceding general election might not elect a governor.

MR. HARTNETT: It won't make any difference. The
325 last gubernatorial election, whenever it might be.

MR. KAVANAUGH: This is again just for a statement of principle.

THE CHAIRMAN: Do you accept the "last gubernatorial election"?

MR. SCHMITTINGER: Yes.

THE CHAIRMAN: Is that seconded?

MR. POPPITI: I second the motion.

THE CHAIRMAN: Any further discussion? If not, will all those in favor please signify by raising your right hand? Contrary?

It is unanimous. So ordered.

MR. O'DONNELL: Harold had some language that was rather suitable.

THE CHAIRMAN: Do you want some restrictions?

MR. O'DONNELL: Criteria for the committee.

MR. WILSON: Yes.

MR. SCHMITTINGER: This comes right out of House Bill 361. I'll read it, if you like:

"Reapportionment and redistricting shall be done in accordance with the following criteria:

1. Each district shall be formed of contiguous territory and shall be as compact in area as is possible.

326 "2. Each representative district within a county shall be as nearly equal in population as may be possible."

That says county. I think we would have to change that.

MR. O'DONNELL: Within a district, I would think.

MR. SCHMITTINGER: Yes.

MR. HARTNETT: Yes, within a district, representative district.

THE CHAIRMAN: "As is possible." This might lead to quibbling. How about "reasonably possible"?

MR. SCHMITTINGER: "3. Each district shall follow existing local boundaries in so far as it is possible."

MR. O'DONNELL: Such as streams and rivers.

MR. SCHMITTINGER: "4. Geographical road features or ancient boundaries shall be used to describe the boundaries in so far as possible.

"5. Each representative district shall choose one representative." We have already covered that.

I guess that's about all.

"No political party or person shall be intentionally favored."

MR. O'DONNELL: I wonder about that "as compact as possible." I think if we make it contiguous, and
327 we have these other standards; some people might think of a perfect rectangle as being more compact.

THE CHAIRMAN: The most compact area is a circle.

MR. O'DONNELL: That would be difficult.

THE CHAIRMAN: I say this could lead to quibbling.

MR. O'DONNELL: Why don't we delete that and have the other standards.

MR. HARTNETT: I think when you are only dividing your representative districts, you don't have nearly the problem. You say contiguous, and equal population; that's going to have to be compact.

THE CHAIRMAN: You are saying something about the boundary lines. Do you mean the natural boundary lines?

MR. SCHMITTINGER: This says "each district shall follow existing local boundaries in so far as is possible."

THE CHAIRMAN: Do you mean local boundaries, or natural?

MR. SCHMITTINGER: Then another one here: "Geographical road features or ancient boundaries shall be used to describe boundaries in so far as possible."

MR. O'DONNELL: Why don't we say "natural boundaries, such as streams."

MR. HARTNETT: Yes.

THE CHAIRMAN: This is what you find in the law.
328 Natural boundaries take precedence over surveyors' courses and distances.

MR. O'DONNELL: How about saying "major roads." I have worked on this business of dividing election districts and if you have a good road like Concord Pike, or something, you can stay on one side of it: Major roads, natural boundaries.

MR. WILSON: Do you need in our present thinking, Item 2, "each representative district within a county," which you have changed to a representative district, "shall be as nearly equal in population as may be possible." We have already covered that some place else.

MR. POPPITI: Yes.

MR. HARTNETT: We've got to eliminate 2. Do you think it should be, "Each district shall follow existing natural boundaries, major roads . . ."

THE CHAIRMAN: How about saying "major roads and other natural boundaries." "Major roads, streams, and other natural boundaries."

MR. POPPITI: Because this is the way our hundreds are pretty much set up now.

MR. WILSON: On streams, yes.

MR. HARTNETT: Each district shall follow existing streams, major roads, or other natural boundaries in so far as possible.

329 MR. O'DONNELL: Reverse that and you've got a better sentence. Streams and natural boundaries should be together. Roads, streams and natural boundaries.

MR. HARTNETT: Then you can leave out this one about geographical road features.

MR. O'DONNELL: Maybe we ought to retain that ancient boundaries because the fewer changes we make the better. It makes people know better what district they live in.

Why don't we say, "ancient boundaries, major roads, streams, or other natural boundaries."

MR. HARTNETT: All right.

MR. SCHMITTINGER: That's all right. How is this commission going to certify its redistricting when it redistricts, and when is it going to be compelled to do it? What right is the public going to have to express itself?

MR. KAVANAUGH: The usual thing is 120 days. As I understand it—somebody correct me if I'm wrong—in your Federal census the Bureau of Census must make an official report on or before December 21st of the census year. Or

maybe it's December 1st, I forget which. But there is in the statute, I think, a definite date on which the Bureau of the Census must report to both houses of Congress its findings with respect to the total population.

MR. O'DONNELL: And on that date is there data
330 with respect to election districts?

MR. KAVANAUGH: No. They become available on a report basis, depending on the particular census tracts that are involved.

MR. O'DONNELL: We can't have our committee tied to a date before the data comes through.

MR. WILSON: Here is what it says: "Within 120 days following the official reporting of each decennial census, the board shall submit to the Governor a plan for reapportionment and redistricting as provided in this article. Within 90 days after receipt of the plan, the Governor shall issue a proclamation of reapportionment and redistricting."

MR. O'DONNELL: That's good if that language was tightened up a little bit to show that we were not directing ourselves to the receipt by the Congress of the overall data. But we are talking about the availability, and as Jerry has said it is available later on on a tract basis.

MR. KAVANAUGH: The language covers it, though, because if I remember what you said, Mr. Wilson, it is within 120 days after the official reporting to the President.

MR. HARTNETT: But is it available to us?

MR. WILSON: Within 120 days following the official reporting of each decennial census, the board shall submit to the Governor . . .

331 MR. O'DONNELL: If we should say "reporting of official census for the election districts of Delaware," that would do it, because if it is just this general overall population study to Congress—I don't know; I am not sufficiently familiar with it.

MR. HARTNETT: I think it comes out in census tracts.

MR. O'DONNELL: Representative district is the only breakdown.

MR. KAVANAUGH: And that is not the same as election district.

MR. O'DONNELL: You are right. I am just trying to tie this in.

THE CHAIRMAN: After the official reporting on the present representative districts.

MR. KAVANAUGH: Could we resolve it this way. I am sure in drafting the definitive language for whatever legislative bill is going to be recommended, that somewhere we can find definitive language that ties it down to what we are speaking about in terms of principles.

MR. O'DONNELL: The census people can find out when this representative district data is available.

THE CHAIRMAN: Is officially reported.

MR. POPPITI: Yes, because what we are interested in is that the time element we embody in our statute
332 will give everybody an opportunity to make a report in time to be used at the next general election.

MR. KAVANAUGH: Let me say this. This is strictly off the top of my head, but in 1960 the census was conducted in April and I am sure that the report was dated December 1, 1960, which gave a breakdown for the representative districts. I may be wrong.

MR. HARTNETT: But next time they may change the rules.

MR. O'DONNELL: This is important. It may be available for the election of 1970.

MR. POPPITI: It won't apply then.

MR. WILSON: 1972 will be the first time it will really apply.

MR. KAVANAUGH: We've got two problems. We've got to specify that the immediate figure will take place as soon as possible, as I understand it, in order to accomplish—

MR. HARTNETT: That is no problem because it is available.

MR. KAVANAUGH: I mean parenthetically or some other way it's got to be put in there.

MR. HARTNETT: It's in here: "Within 120 days following the official reporting of each decennial census, or within

120 days after this amendment of this constitution
333 takes effect, the commission shall submit . . ."

MR. POPPITI: If the census is taken in 1970, assuming that we don't get a report until December, obviously the decennial census can't be used for any basis of apportionment in the election of 1970, correct?

MR. WILSON: That's right.

MR. POPPITI: What apparently has been provided here is machinery to insure that within seven months following the receipt of these figures, the reapportionment would take place. This means that assuming the report was available in December, by July the reapportionment process would have taken place and then all of the necessary machinery for changing election districts and so on would have an adequate time to prepare for the 1972 election.

MR. KAVANAUGH: That's right.

MR. O'DONNELL: That is what we want to accomplish. Now we are looking for the phraseology.

MR. WILSON: Right.

MR. POPPITI: Somebody has to verify when this material will be available.

MR. O'DONNELL: That's right.

MR. HARTNETT: We could set a date, like one year following any census. Of course, in Delaware we have a break because we have it every two years. Some states
334 have it every year. We have two whole years.

MR. POPPITI: One way to do it, following your thinking, is to say that by the first day of September following the receipt of the data they shall have done thus and so.

MR. HARTNETT: Right.

MR. POPPITI: But it is always better to direct the commission to convene.

MR. HARTNETT: We can say they shall convene 18 months before the next election.

MR. WILSON: I think this other language is better, 120 days and 90 days.

MR. HARTNETT: I would like the 120 days if I was sure that the data would be available.

MR. HARTNETT: Somebody got this from some place.

MR. KAVANAUGH: The phraseology, "blank days following the official reporting of each decennial census to the President of the United States (or within blank days after the amendment of this constitution takes effect), the commission shall submit . . ." is language common to each of the three bills. House Substitute 1 for House Bill 2; House Bill No. 361, and House Bill 572. I'm sure you will find, if you have the two additional bills, that it is in these bills too.

335 MR. HARTNETT: It is not in 361.

MR. O'DONNELL: These people will have until 1970 to get organized to receive this.

MR. POPPITI: How about if we simply suggest the 120 and 90 days time limitation?

MR. O'DONNELL: That language is satisfactory to me that Jerry has just read. Is that language satisfactory to you, Jerry?

MR. KAVANAUGH: Yes.

MR. O'DONNELL: It is satisfactory to me.

MR. POPPITI: I think that is satisfactory.

MR. HARTNETT: 361 was taken from the Alaska constitution, which is supposed to be the hottest constitution.

MR. KAVANAUGH: In the two blanks could we insert the figures 120 and 90, in that order. I will so move the adoption of the motion.

THE CHAIRMAN: Did we approve these restrictions on the reapportionment committee, that you brought out?

MR. SCHMITTINGER: I think in general they were agreed to.

MR. WILSON: We agreed. I don't know whether we formally approved or not.

MR. POPPITI: Do you want to back up?

MR. O'DONNELL: I move that the language as
336 mentioned by Mr. Schmittinger with respect to the

restrictions on the committee, or guidelines, for the committee, be adopted.

MR. WILSON: I second that.

THE CHAIRMAN: There was one that you eliminated.

MR. O'DONNELL: As amended.

MR. WILSON: Seconded.

THE CHAIRMAN: Any further discussion? Are you ready for the question? All those in favor signify by raising your right hand.

It is unanimous.

Now we come to the question of the time element as to when the reapportionment committee shall act pursuant to the authority which it has.

MR. KAVANAUGH: Why don't I just read the language as it appears in this bill?

MR. HARTNETT: Which bill?

MR. KAVANAUGH: 572. I put this in the form of a motion.

Resolved, that it is the sense of this subcommittee that the legislation on a constitutional amendment contain in principle the following expressed thought, namely, that within 120 calendar days following the official reporting of each decennial census to the President of the United States, or within 120 calendar days after the amend-
337 ment of this constitution takes place, the commission shall submit and file with the secretary of state a plan for reapportionment and redistricting as we have heretofore agreed, and in accordance with the criteria which this subcommittee has established heretofore, and that such plan shall automatically become law 90 calendar days following the beginning of the next regular session of the General Assembly, and shall be effective at the next general election.

MR. WILSON: How do you mean the regular session?

MR. KAVANAUGH: Let me back up. Suppose we just stop it right there at the word "heretofore," and delete "and that such plan shall automatically become law 90 calendar days following the beginning of the next regular session of the General Assembly," etc.

I move the adoption of that resolution.

THE CHAIRMAN: Any further discussion?

MR. SCHMITTINGER: I second that.

THE CHAIRMAN: All in favor signify by raising your right hand. All opposed.

It is unanimous.

MR. KAVANAUGH: The portion that I asked be deleted has to do with the time at which the findings of the commission shall become effective as law.

THE CHAIRMAN: It is filed with the secretary of
338 state when?

MR. KAVANAUGH: Within any number of days—30, 90, whatever you want. Well, it is filed with the secretary of state, period. But the plan then becomes automatic upon the expiration of X calendar days following the beginning of the next regular session of the General Assembly, and shall be effective for the next general election.

In other words, hypothetically, I suppose the way this would work, if you got your official reporting on December 1st of 1970, we have already said 120 days after the official reporting—that is a three-month period—so on the 1st or 2nd of March of 1971 the commission would submit and file with the secretary of state a plan for reapportionment and redistricting.

That plan would automatically, within so many calendar days following the beginning of the next regular session—now our sessions, as I understand it, start the first business day—

MR. O'DONNELL: The first Tuesday after the first Monday.

THE CHAIRMAN: In January.

MR. HARTNETT: Let me interrupt here. This bill here was written with the idea of tying in with the beginning of the legislature becuse it was going to give the legis-
339 lature the right to veto. I don't think we want that.

THE CHAIRMAN: That's right. My point is this. Don't you want in there that as soon as it is filed the

Governor shall proclaim the same and thereupon it shall become law?

MR. POPPITI: Yes.

MR. O'DONNELL: That's where I want to go off the record and ask a question.

THE CHAIRMAN: Yes.

(Discussion off the record.)

340 MR. KAVANAUGH: I think I left off in the middle of explaining the previous language. The deletion was requested for the reason that it injected a principle not compatible with the question of filing the plan. This principle has to do with when the plan as filed by the commission shall take effect, and the mechanics for taking effect.

The discussion on this has been limited in our previous meetings, and I think my view would be that we would need to provide that the Governor by proclamation would establish the effectiveness of any reapportionment and redistricting plan agreed to by a majority of the three-member commission which we have talked about previously, and I think a second element which would involve in principle the right of veto by one or both houses of the General Assembly.

MR. SCHMITTINGER: Where would you be if it was vetoed?

MR. POPPITI: I think you ought to forget about the veto business.

Suppose Brandywine, following our plan, has four representatives. Along comes the 1970 census and instead of their having 60,000, they have 90,000, and the commission, as we contemplate it, recommended they have six representatives, and the Legislative vetoed the plan showing six representatives from the Brandywine Hundred area.

341 You would have a lawsuit on your hands, wouldn't you.

MR. KAVANAUGH: Yes.

THE CHAIRMAN: Gentlemen, I am going to suggest this, that the plan shall be made effective as the constitutional

apportionment of the House for the ensuing dicennial by a proclamation of the Governor within 30 days after the time for filing a judicial review has expired, or within 30 days after a final judgment shall be handed down by the Court having jurisdiction of any such review.

MR. HARTNETT: Would you say the proclamation would be?

THE CHAIRMAN: That the reapportionment plan shall be made effective for the ensuing dicennial by the proclamation of the Governor, which shall be made effective after a 30-day period of judicial review has expired, or 30 days after final judgment shall be handed down by the Court having jurisdiction of such review.

MR. HARTNETT: Wouldn't it be better to have the Governor proclam it within 120 days following the initial reporting, and then it become final after 30 days of the proclamation, or within 30 days of a final decree?

How are you going to appeal from something that is not proclamed? It has to be proclamed before you can appeal.

THE CHAIRMAN: I will accept that.

342 MR. SCHMITTINGER: You are suggesting that we exclude the possibility of the Legislature vetoing the proclamation?

THE CHAIRMAN: Entirely, yes.

All right, let me point out one thing.

Your judicial review is initiated in a Superior Court. There is an appeal to the Supreme Court. What is the time limit on such appeal?

MR. O'DONNELL: 60 days now.

THE CHAIRMAN: There would be 30 days for review, then a period of time for the judgment of the Superior Court, 60 days for the appeal, disposition of the appeal, and 30 days thereafter.

Where are we going?

MR. O'DONNELL: Of course this is a constitutional amendment, and we could make the appeal period shorter in a case of this nature, if we wished.

THE CHAIRMAN: Well, this language, as I conceive it, is in the nature of a statute of limitations, anyway.

MR. E. S. WILSON: The only trouble is, do you have any control over when the judge gives his decision?

THE CHAIRMAN: No.

MR. SCHMITTINGER: In a case of this nature, they would expedite it, I believe.

343 MR. HARTNETT: There is plenty of time. They have a year.

MR. O'DONNELL: The Federal statutes call for such matters to take precedence, and causes the Court to put aside negligence, and divorces, and so forth—not the Federal Court, but it would in our case, if we had such a provision.

MR. E. S. WILSON: But you know as well as I do that the Superior Court takes sometimes a year to get a decision.

THE CHAIRMAN: What would the date of the proclamation be? We tee off from that.

MR. HARTNETT: I don't think the board can proclaim it, or the commissioner.

THE CHAIRMAN: No, the Governor.

The board files the report with the Secretary of State, then the Governor shall proclaim it.

MR. HARTNETT: I would say 30 days.

THE CHAIRMAN: Why not say forthwith, and get it over with?

MR. KAVANAUGH: Do we have a time factor problem of letting the people know?

THE CHAIRMAN: Let's make it forthwith, or within 30 days thereafter, or whatever the limitation period is.

All right, you get a proclamation, and when would
344 it come down if it is forthwith after the filing of the report of the committee?

We anticipated there would be the availability of the Federal census in December, 1970, and then we got into March with 120 days, and then they file their report in March. The Governor proclaims it at once, and we are into 1971.

MR. KAVANAUGH: Yes, the first of April.

THE CHAIRMAN: Then you fix a period of limitation. Perhaps it should be 30 days in order that the people may know of it.

MR. HARTNETT: At least 30 days.

THE CHAIRMAN: All right, that gets you in April. Then it becomes final sometime in April or May of 1971 unless there is a review and an appeal.

So April of 1971 until November of 1972 ought to give sufficient time, if you provide that these reviews and appeals shall take precedence. I am sure the Court would dispose of it promptly.

MR. SCHMITTINGER: Which should be ample time.

THE CHAIRMAN: Yes. I just wanted to be sure of that mathematically.

All right, the proclamation forthwith, to become final within 30 days unless there is a review, in which
345 event it shall become final upon the final judgment upon review.

Suppose the final judgment upon review is, "You have committed certain errors, and the proclamation is set aside, period."

Should it go on farther than that and say what the proclamation should be?

MR. KAVANAUGH: No. I think then we are back to where we are now. The relief would be whether or not the apportionment as it existed immediately prior to the finding of the proclamation would meet the constitutional standards and tests which we hope will be enunciated some day.

THE CHAIRMAN: I am not thinking of that. I am thinking of this: We have laid down certain standards to be followed by the commission. The Governor's proclamation follows the commission's report. Suppose the Court finds they have not followed the standards set forth in our own constitution for reapportionment, and they set it aside.

Then do you get into this problem of the Governor having to issue another proclamation pursuant to the judgment of the Court? Or shall we anticipate that the judgment of the Court shall declare the truth of the matter?

MR. O'DONNELL: No, based upon the decisions, so far, I do not think we can assume that.

346 THE CHAIRMAN: I think your apportionment commission would have to go back and get to work on this in the light of the review.

MR. KAVANAUGH: Shouldn't we think in terms that if the Court finds the commission in error in the report or plan that it has filed, then the Court would have in its authority to correct such error as found by reason of the commission's not applying the standards?

MR. O'DONNELL: The Court would not want that, and I do not think we do, either.

I think if the commission has come up with an inequitable plan, the Court will direct them to create a new plan. If they don't do it by—

MR. HARTNETT: This is by mandamus, anyway, so they would be ordered to bring up a new plan.

MR. O'DONNELL: I think they would order that a master do it, such as has been done in many cases.

THE CHAIRMAN: Then you would not need another proclamation. This proclamation is voided, and the Court tells you why it is voided, then the Court tells you what to do.

MR. KAVANAUGH: Is it voided if your proclamation is so worded that the plan shall take effect within 30 days provided there has not been a final determination by a

347 superior court mandamus proceeding, and final judgment upon any review?

MR. O'DONNELL: Well, it is void one way or the other. If the Court says it is void, it is either void because it never was, or void because the Court says it is.

THE CHAIRMAN: We have to check on gerrymandering. Suppose the Court finds an ink spot in this representative district, under gerrymandering, and so they say, "No, that

does not meet the standards under this gerrymandering, therefore it is void."

Does the Court go on and say, "You shall do it this way: You shall redistrict it down Concord Pike, and out here, and so forth"?

This would put the Court right back in it.

MR. HARTNETT: They might have to, or might say, "Go back to the commission and do it over again."

THE CHAIRMAN: All right, so the commission goes back and does it over again. Having done it over again, when does that redoing become law?

MR. HARTNETT: I would say by the terms of the mandamus, I think the Court would have to make it effective.

MR. O'DONNELL: I think you are right, if the Court takes that route. But I would think the Court would take another route, at least the first time. It would if I were on the Court.

348 I would order the commission to do it and do it directly. And if that is the case, then we do not want the language about when the executive order shall be entered to be too restrictive.

THE CHAIRMAN: No, certainly not.

MR. O'DONNELL: It certainly seems to me if the Court orders them to do it over again, and they do it over again, the Governor should issue another order.

I don't think we have to tell him to, because it is implicit. But if we have to tell him to do it over again, I would not object to it.

MR. HARTNETT: Don't you think if the situation arose, the Court would probably decide and tell the commission to come up with it, and issue a new proclamation?

MR. O'DONNELL: I would certainly think so. The government would be a defendant there.

THE CHAIRMAN: Isn't this what would happen in a mandamus?

Does your right of mandamus require a return, in the sense that, "You are hereby compelled now to do such

and such a thing within such and such a time," and doesn't the official have to make a return to the Court and say, "I have done this," and then the Court on motion review what they have done, to see if they have complied
349 with the order?

MR. O'DONNELL: Yes.

THE CHAIRMAN: So it would automatically become effective when the commission and Governor have made a final return which meets the requirements of the court.

Do you think we have to spell that out?

MR. O'DONNELL: I don't think so.

MR. HARTNETT: I don't, either.

THE CHAIRMAN: In effect, wouldn't the court say, "You are hereby directed to revise and amend your report, and the proclamation of the Governor made pursuant thereto, in the following respects and make report back to the court," within a specified time, and then that would be reviewed on motion and in effect you have then an amended proclamation?

MR. POPPITI: Of course when you are in the field of mandamus it would have to be something so clear and ministerial it should have done it in the first instance.

MR. SCHMITTINGER: I cannot conceive of any Delaware governor abusing this discretion.

THE CHAIRMAN: It would have to be a clear case of abuse.

MR. O'DONNELL: Well, it should be. It is not a judicial function. They should not get into it unless it is a
350 matter that is not debatable.

MR. HARTNETT: If we want the court to do it, we tell them in the first place.

MR. O'DONNELL: Yes, it should be a pure case of abuse of discretion on the part of the commission.

THE CHAIRMAN: I think under the writ of mandamus and the judgment of the court it would take care of itself.

MR. SCHMITTINGER: You mean the abuse would not happen in the first place?

THE CHAIRMAN: No. Once they found abuse, they would so declare it and order that the report and proclamation be amended or revised, and that would have to be done, and a report made by the commission and the governor to the court. Once the court approves the return, that is final.

Perhaps some language would be appropriate that to become final within—

MR. POPPITI: 30 days after publication of said proclamation in a newspaper in general circulation in the State of Delaware.

I think you have to start from somewhere where everybody gets notice. Why can't we say that?

THE CHAIRMAN: It becomes final then, or upon the final judgment of the court?

351 MR. POPPITI: Would you leave that implicit, and merely say, in view of our discussion, that the reapportionment commission shall file its report with the Secretary of State, whereupon, the Governor shall proclaim the plan as adopted by a majority of the reapportionment commission, and said proclamation shall be published in a newspaper of general circulation in the State of Delaware, and 30 days thereafter the plan shall become effective.

If you stop there, obviously if there is a court review this would arrest the implementation of the proclamation.

Why don't we leave it at that point?

THE CHAIRMAN: In other words, it would be implicit by merely providing for judicial review?

MR. POPPITI: That is right, yes.

THE CHAIRMAN: Are all lawyers agreed that it is implied?

MR. O'DONNELL: I am.

MR. KAVANAUGH: Yes.

MR. O'DONNELL: I think the value of what we are doing now is in the limitations provision. Because I think everything else is of right by virtue of the United States Supreme Court's acts, and the real value to the people of

Delaware would be a prompt decision. We would
352 not have litigation the day before filing, such as we have now. This will clear the air one way or the other within a reasonable time prior to the election.

MR. POPPITI: And realistically all of this will not be going on in a vacuum. The results of a census will be known to the people interested in the various hundreds, and they will certainly know that the population has gone up.

This thing, I think, would be a subject of constant discussion. So when the proclamation is issued there ought to be some date after which the thing should become effective if no action is taken.

THE CHAIRMAN: Then do I hear a motion that the effectiveness of the report of the constitutional apportionment commission will be by proclamation of the Governor, which shall become final within 30 days after it has been published in a newspaper of general circulation, and that the right of judicial review by mandamus or other appropriate remedy shall be limited to such 30-day period?

MR. POPPITI: I so move, Mr. Chairman.

MR. CHAIRMAN: By that you understand, gentlemen, I mean the commencement of the action.

MR. E. S. WILSON: Second.

MR. O'DONNELL: Second.

353 THE CHAIRMAN: All right, are you ready for the question?

All those in favor signify by raising the right hand.

Contrary?

It is unanimous.

MR. E. S. WILSON: Off the record.

(Discussion off the record.)

MR. KAVANAUGH: Before we leave the constitutional amendment I would like to ask a question.

Are we satisfied that we have covered all the things we might want to include in the constitutional amendment? Are there any other safeguards that we may want to impose?

MR. HARTNETT: I think some people misunderstood what I meant last time when I said I thought there ought to be some provision for setting a maximum limitation upon the members of the House.

I did not mean by that the present method of apportionment would be affected by the maximum, that is, that New Castle County would be limited to a certain number of members under the system.

What I meant to say was that I think a maximum of the House of Representatives ought to be set, and when that figure is reached there should be a provision
354 that there would have to be reapportionment at that time—complete reapportionment.

I think eventually the House may become so large that we are going to have to combine these small districts and reduce the total number of districts.

MR. E. S. WILSON: Why don't we cross that bridge when we come to it?

MR. HARTNETT: Well, the only danger is that at that time the members of the House, in my opinion, would not look with favor upon reducing their size, because it would be reducing their own membership.

In other words, I would set a limitation on this plan, but I am not going to strongly argue it here. I am just going to point out some other people have mentioned it to me.

THE CHAIRMAN: Then we would have to put in this constitutional amendment another elaborate section as to what should occur when that day arrives.

MR. HARTNETT: That is true.

THE CHAIRMAN: I would rather leave that to another day.

MR. KAVANAUGH: May I rephrase that to "another generation"?

May I ask, too, in respect to what we have just done in connection with enunciating a principle that the
355 reapportionment plan shall be filed within 120 days, it is my understanding, and I certainly hope you all agree, that this is a mandatory provision insofar as the

commission which we have talked about is concerned, and is not merely a permissive thing.

MR. O'DONNELL: Oh, no, it has to be.

THE CHAIRMAN: I think this is as close to being automatic as we can do, and that is what we are shooting for. There will be no quibbling at the bar.

MR. HARTNETT: I do not know if this language of Alaska will be used, but it says in there, if they do not act within 120 days, then they will compel it to act.

MR. KAVANAUGH: I was not sure if in our discussion this was considered.

MR. HARTNETT: As a matter of fact, it was not.

MR. KAVANAUGH: I knew we considered the fact that they shall file a plan within a certain time.

THE CHAIRMAN: Do you move that provision be incorporated within the plan?

MR. HARTNETT: I move that in the event the reapportionment commission does not act within the 120 days as provided in the constitution, a 30-day period for the bringing of a mandamus action to compel it to act be
356 included in the constitutional amendment.

MR. KAVANAUGH: Second.

THE CHAIRMAN: All right, all those in favor?

(Unanimously carried)

THE CHAIRMAN: All right, gentlemen, I certainly want to congratulate this committee at this stage. I feel extremely well pleased with the progress we have made.

Off the record.

(Discussion off the record.)

THE CHAIRMAN: Have I called on each member of the committee here to express his initial views of a constitutional convention?

MR. POPPITI: I think we have done that.

MR. HARTNETT: I think we have beaten it to death, and nobody has changed his mind.

THE CHAIRMAN: All right, let's get into the meat of it.

I have only one thing to add to that, and it is this: I have had occasion to mention to the Governor in one conversation a provision for a constitutional amendment which would shorten the time for the election of delegates and the convening of a constitutional convention. It was his
suggestion that I discuss this with Judge Herrmann,
357 who I understand has on occasion been called upon to advise the Governor on legal matters.

This I did. He had his office staff make as quick a study as they could, and he now feels that if step number one, which is the calling of the constitutional convention, transpires at this ensuing election, and if there is a constitutional amendment which would provide for the shortening of the time when that constitutional convention should be convened, that this would not affect the constitutionality of such a convention, even though the call and the voting on the call had taken place before the amendment became effective.

He did suggest, however, that in the legislative act which provides for the call, it provides in substance that in addition to the formal words of the call there be spelled out in some detail that such a constitutional amendment is under legislative advisement, and that the voters who vote for it would clearly understand that having voted for the call it would be possible that the shortening provisions would be effective with regard to the constitutional convention on which he calls. So that no voter could say that he did not clearly understand this was in the making at the time he voted for the call.

I think that about states his feeling on the thing.

358 MR. HARTNETT: While sitting here I am wondering if before we go on to the constitutional convention we should have a motion that we consolidate all of the parts we have hammered out here.

Do you think we ought to have a motion to do so?

MR. E. S. WILSON: Well, isn't the constitutional convention a part of it?

MR. HARTNETT: I don't know. Is it?

MR. E. S. WILSON: Yes.

THE CHAIRMAN: My present thinking is that I agree with Mr. Wilson, our reservation is as to the entire report.

One other thought was expressed by Judge Herrmann, that the present constitutional provision, if anybody has it here, merely provides for the legislature to implement the election of delegates.

MR. HARTNETT: I don't think you can implement it until after the election.

THE CHAIRMAN: I mean the election of delegates.

MR. HARTNETT: I don't think that can be done until after the referendum.

THE CHAIRMAN: That is right. Not until after. But he suggested that this is rather vague and uncertain as to how they shall go about implementing it, particularly
359 with respect to the matter of the nomination of candidates, that is, for delegates.

He thought that possibly that should be clarified, because one of his law clerks had been doing some research into this in connection with a law journal article that was being written by some professor of some law school, and similar provisions seem to indicate that possibly the legislature itself would be able to pass upon who would be candidates for the office of delegate to the constitutional convention.

MR. O'DONNELL: You have lost me. These suggestions relate to an amendment of our constitution that might be taken up either by the legislature or a two-legged amendment, or a constitutional—

THE CHAIRMAN: No. This would be by another two-legged amendment.

MR. O'DONNELL: But why is that coming before us?

THE CHAIRMAN: The only way I can see that would come before us is in this manner: That if we are proceeding with a pitchfork that has two prongs, and we are doing this in order to persuade the court that Delaware is moving

forward in the utmost good faith, and we feel this is essential for purposes of evidencing our good faith, then the court may well say, "Well, this is no particular
360 evidence of good faith, because this does not transpire until September of 1965, which is a long day away."

So it may be that in order to avoid that criticism by the court we should suggest a further two-legged constitutional amendment to shorten the time. Because let's assume that the court should say the plan we have come up with on the first prong of the fork is not constitutional. There is nothing that the State would then be doing to show that it is ready to take a further step in good faith. And if we say, all right, we will put the simple question: "Shall there be a constitutional convention to revise the constitutional amendment?" And they would say, "That is not sufficient, in view of the fact that your first step was hopelessly inadequate, because this will not take place until 1965, and today is the day," and so judiciously decrees it. In light of that, this is where the thing comes up.

MR. O'DONNELL: I follow you. May I go off the record?

THE CHAIRMAN: Yes.

(Discussion off the record.)

THE CHAIRMAN: Isn't the question now shall we vote for or against a constitutional convention, either with or without a proviso for the shortening of the time
361 of the delegate election and the convening of the convention?

MR. O'DONNELL: My recommendation would be let's do it in two steps. Let's go for the constitution without burdening it with the shortening process, and see where we get on that. Some people might object to the shortening without objecting to the convention.

MR. HARTNETT: Or vice versa.

MR. E. S. WILSON: Make your motion.

MR. POPPITI: I will move that this committee recommend

to the main committee that the question of the constitutional convention be placed on the ballot this fall, and that the constitutional convention be called pursuant to the provisions of the State constitution, and that the number of delegates spelled out in the constitution, as it presently exists, shall be the number of delegates for the constitutional convention.

THE CHAIRMAN: And the apportionment thereof.

MR. POPPITI: And the apportionment thereof.

MR. SCHMITTINGER: Do I understand by that motion, Mike, that you are urging a bill for the convention first, before this constitutional amendment?

MR. O'DONNELL: Simultaneously.

MR. POPPITI: Simultaneously.

MR. SCHMITTINGER: Oh, you mean two separate bills?

362 MR. POPPITI: Yes, they would have to be.

MR. O'DONNELL: We are urging them at the same time.

THE CHAIRMAN: Yes, simultaneously.

MR. SCHMITTINGER: As I said before, I think the convention is going to cost votes and maybe even lose the amendment.

MR. O'DONNELL: Would you accept this amendment, that this committee recommends that the vote of the constitutional amendment be brought up in the Houses of the General Assembly after the vote on the amendment. Would that take care of your fears?

MR. SCHMITTINGER: I would think we ought to vote on the amendment first.

THE CHAIRMAN: That's what he is saying.

MR. O'DONNELL: Would you accept that as an amendment, Mike?

MR. POPPITI: Sure.

MR. O'DONNELL: I will second his motion.

MR. KAVANAUGH: Is this a motion to amend?

MR. POPPITI: No, as amended.

MR. O'DONNELL: We never had a vote on his amendment.

MR. KAVANAUGH: His motion hasn't been seconded yet.

MR. O'DONNELL: I second it.

363 THE CHAIRMAN: And he has accepted the amendment.

MR. KAVANAUGH: Could somebody tell me what we have on the floor?

MR. POPPITI: I will repeat the motion: That we call a constitutional convention with 41 delegates with the apportionment as it now exists in our constitution. However, the bill to call a constitutional convention shall be submitted for consideration by both Houses of the Legislature after they have considered the amendment to the constitution setting up the plan of reapportionment that we adopted prior to this.

THE CHAIRMAN: Substitute the words "shall be acted on" after they have acted on, instead of "considered."

MR. POPPITI: All right, after they have taken final action on the constitutional amendment.

MR. KAVANAUGH: Now discussion. Could I understand the niceties of that distinction, the difference between "acted" and "considered". Which is it now?

THE CHAIRMAN: Well, one is that you may consider it and take no action; the other is that the action on this recommendation of the committee shall take place in the General Assembly after they have acted upon our proposed two-pronged constitutional amendment.

MR. POPPITI: I gather the feeling around the table
364 is we don't want to give them a choice.

THE CHAIRMAN: Right.

MR. POPPITI: And I gather that the feeling is we want to get definitive action on the constitutional amendment first.

THE CHAIRMAN: Right.

MR. O'DONNELL: That is right.

THE CHAIRMAN: And then, and only then, shall they act on this proposal.

MR. POPPITI: Coming back to what we said earlier this afternoon, that it is possible that we may only get part of this job done in the legislature.

MR. KAVANAUGH: Now, for clarification, may I understand that it is the sense of this group that we will recommend unanimously to the Governor's full committee of 32 that it is the sense of this committee that there be simultaneous consideration by the legislature of both the constitutional amendment and the constitutional convention?

THE CHAIRMAN: They can consider them together but they have to act on No. 1 before they can act on No. 2.

MR. KAVANAUGH: Is this the sense of everybody now, Harold?

MR. SCHMITTINGER: They have to act on the 365 amendment first.

THE CHAIRMAN: They can consider them together if they want to.

MR. O'DONNELL: We can't regulate how they can consider them.

MR. HARTNETT: We can only recommend.

MR. KAVANAUGH: I just want to be sure that this subcommittee's report will recommend concurrently the consideration of a constitutional amendment and a constitutional convention. That is all I am concerned about, because I say it is presumptuous of this subcommittee to second guess, or prejudge, what the parent group is going to do, and then leap over that and try to guess what the legislature is going to do.

I am satisfied if this group can be of record unanimously that it believes in a concurrent recommendation on these two principles.

THE CHAIRMAN: I think that the consensus of this motion is this, that we recommend that the General Assembly consider both the constitutional amendment for reapportionment of the General Assembly pursuant to a

plan which we have drawn, and that they also consider the calling of a constitutional convention at the same time, but that they shall act upon the constitutional amend-
366 ment for the reapportionment of the legislature before they shall take action upon the call of the constitutional convention.

MR. POPPITI: Now, can we go off the record a minute?

THE CHAIRMAN: Yes.

(Discussion off the record)

MR. SCHMITTINGER: I think we are ready to vote on that. I call for the question.

THE CHAIRMAN: It has been moved and seconded. Are you ready for the question? All those in favor signify by raising your right hand. Those contrary?

It is unanimous.

MR. O'DONNELL: To move things, are we now ready for a reconsideration of the whole report?

THE CHAIRMAN: One thing further. Shall we propose a resolution that there be a second constitutional amendment providing for the shortening of the holding of the constitutional convention, and that Judge Herrmann's office be asked to draft it?

MR. O'DONNELL: I was thinking of that. Why isn't that just a request that the Chair can make, so that we can all see that, without making it a big resolution?

THE CHAIRMAN: When can we see it?

MR. O'DONNELL: I don't see how we can see it
367 before Monday night.

THE CHAIRMAN: The only reason that I press this is because I want the court itself to gather from our report, if it is ever brought to their attention, that this is the first step in the Delaware process of good faith to show that we are not dragging our feet by having a constitutional convention take place way up in 1965, but that this committee feels that there should be a shortening of the time.

MR. HARTNETT: Suppose it doesn't pan out, though?

THE CHAIRMAN: Very well, then the legislature is the one.

MR. KAVANAUGH: The risk of jeopardizing the constitutional amendment is necessarily inherent in anything else you do. But I am tremendously impressed by this concept, in order to impress the public and the court as to the sincerety and the statesmanship of this group, that we are of a mind that if it can be done and done properly, that it be so ordered.

THE CHAIRMAN: In other words, here is the situation. Let us just suppose, for example, that the General Assembly refuses to go for our constitutional amendment on reapportionment but says we will go for this because we feel that this is a matter of public moment and the public should get at it just as soon as possible. And
368 if the legislature shortens the time by the constitutional amendment, perhaps that will be persuasive to the court.

MR. POPPITI: And I think we ought to explore the question too because presumably if they will go for the question of the constitutional convention, if they are interested, then presumably they would be interested in getting to it as soon as possible.

THE CHAIRMAN: Now, instead of 1965.

MR. POPPITI: Right.

MR. HARTNETT: But you are asking us to vote on a constitutional amendment which we have not seen. Suppose this boy brings up something that is totally unacceptable to the committee? Then it will look worse to the court.

MR. O'DONNELL: Let's separate the boy and the principle. I am trying to draft one on the principle now, and I think asking the boy for his thoughts in forming a draft is something we ought not to get into.

What is the Article?

MR. KAVANAUGH: Article XVI, Section 2.

(Discussion off the record.)

MR. O'DONNELL: I suggest this:

Resolved that this committee believes that Article XVI,
Section 2, of the constitution of the State of Dela-
369 ware should be amended, if possible, to reduce the
time between a referendum calling for a constitu-
tional convention and the actual convening thereof.

THE CHAIRMAN: Let's see if we can make that a little bit stronger. To reduce the time to the shortest reasonably possible period.

MR. SCHMITTINGER: I wonder if it is wise to have such a provision in your constitution?

MR. KAVANAUGH: This is just an expression of the sense of this group.

THE CHAIRMAN: What we are saying is that once the people have said we want a constitutional convention, then we say they should have it within the shortest possible time. They have made up their mind.

MR. KAVANAUGH: This may not be built into the new constitution. We are taking advantage of what we see in the constitution as it is presently written, which is permissible.

THE CHAIRMAN: I can see some reason for the way it was written in 1897, where lines of communication were indefinite and uncertain, the play of one man's mind against another was slow, and so forth. But in this modern day, once people have said we want a constitutional convention, they should have it.

MR. O'DONNELL: I just added to what I said, "To
370 reduce the time between a referendum calling for
a constitutional convention and the actual convening
thereof to the shortest possible time."

THE CHAIRMAN: Shortest practical time.

MR. O'DONNELL: Shortest practical time.

MR. KAVANAUGH: You can say the shortest practicable time consistent with the present provisions of the constitution.

I will second that motion.

THE CHAIRMAN: Any discussion, gentlemen? Are you ready for the question? If so, all those in favor signify by raising the right hand. Contrary? So ordered.

It is unanimous.

Gentlemen, you now have the proposed substance of the report before you.

MR. O'DONNELL: Excuse me. We are not squared away about the consideration of the whole.

THE CHAIRMAN: That is what I say. You now have the substance of the tentative report before you. Shall this be the final report, in substance? Will somebody move that it may be?

MR. E. S. WILSON: I would like to make this one comment. Our task has been to provide a plan of action on reapportionment that would satisfy the recent action
371 before the Federal court, and performable by our legislative body. I endorse the plan as a compromise. It is a step in the right direction but it is not true reapportionment. It raises the voting rights of many of our full taxpaying citizens from 1/35th of a vote to 1/14th of a vote. It raise from 18 to 28% the fraction of the voters to control the House, which is based on population. It is step in the right direction.

THE CHAIRMAN: Any other comments, gentlemen?

MR. O'DONNELL: Yes. Off the record.

THE CHAIRMAN: Off the record.

(Discussion off the record)

MR. HARTNETT: My comment is that although I have opposed and still do oppose the idea of recommending a constitutional convention, I, in the spirit of compromise, intend to vote for the entire plan.

THE CHAIRMAN: Report.

MR. O'DONNELL: I would like to say for the record too that I do not believe that this is the best possible plan that we might have adopted, but I believe that under the circumstances it is a good plan and should be adopted.

MR. HARTNETT: I would like to say that I do, however, think that the plan for reapportionment is a good plan.

MR. POPPITI: I think I have made my position
372 known from the outset, that I suggest that we go into this with a spirit of bipartisanship, that we recognize the problem, and in recognizing the problem we should recognize what goals can be attained.

I think that what we have worked out here is within the spirit of the opening remarks which I made, even though I recognize, like Mr. Wilson and Mr. O'Donnell, and I am sure all of us around the table, that we have not achieved the ideal. But at least it is a step in the right direction and I think that succeeding groups who may have to consider this question will go in the direction of ameliorating the situation and getting closer to the ideal.

MR. SCHMITTINGER: Mr. Chairman, I would like to state that I intend to vote for the entire report because I believe the interests of the whole State of Delaware have been adequately represented and protected in these proceedings. And I further believe that the reapportionment amendment is a reasonable one, and in my judgment, and I hope in Mr. O'Donnell's judgment, it will give him the necessary basis for defending this suit that was brought in Federal court.

MR. KAVANAUGH: For the record, I am going to vote for the report of the deliberations of this subcommittee in its entirety, and the conclusions which we have reached
373 as a deliberative body.

I know that I have not seen all that I would have liked to have been included in a formal report to the Governor's committee, but I feel that the work that this group has done is so permeated with a spirit of sincerity, conscientious endeavor, and statesmanship that not to vote for it would do a disservice to my fellow subcommittee members and to the Governor's committee.

I endorse the report, and I urge and appeal to each and every member of the Governor's committee to attend

to his responsibilities or the parent group with the same degree of sincerity and statesmanship that has infected this entire body.

THE CHAIRMAN: Senator Johnson.

MR. JOHNSON: I intend to vote for the recommendations of the committee in its entirety, and I believe that these recommendations are worthy of the consideration and support of every member of the General Assembly. It indicates more progress than we have made on this question over a period of many years.

THE CHAIRMAN: Gentlemen, at the outset we conceived our problem to be that of coming up with a plan which was rational, which was not invidiously discriminatory. At the outset it was our responsibility to take the first step to evidence to the District Court of the State of Dela-
374 ware that this State is ready to go forward in all good faith towards evolving and promulgating and making effective such a plan.

It was also our responsibility to devise a plan which we believe in our combined opinions would be acceptable to the State as a whole, although not necessarily to each separate segment of the State. By the State I mean as it speaks through its representatives in the General Assembly.

I sincerely believe that in the historic spirit of compromise, which is one of the fundamental principles of a Republican form of government, we have evolved such a plan as a result of our deliberations.

I want to thank all of you for the statesmanlike spirit in which you have, each and every one, approached this problem and have come forth with this report. I shall not only vote in favor of the plan but I shall commend it to the parent body, and if called upon I will commend it to the General Assembly.

Is there any further discussion?

If not, all those in favor of the report signify by raising your right hand.

It is unanimous.

For the record, will somebody make a motion that we recess until Monday night at 7 o'clock, to reconvene at the office of the Governor?

MR. KAVANAUGH: Do I have the Chair's permission to absent myself from that meeting because of the pressure of other business?

THE CHAIRMAN: Yes.

MR. POPPITI: I so move.

MR. E. S. WILSON: Second it.

THE CHAIRMAN: All in favor signify by saying aye.

So ordered.

(Whereupon, at 10:35 p.m., the meeting was adjourned.)

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IN THE

Supreme Court of the United States

October Term, 1963.

No. 307.

MABEL V. ROMAN, Clerk of the Peace for New Castle County; WALTER A. HANDSBERRY, Clerk of the Peace for Kent County; I. ROBERT WILLEY, Clerk of the Peace for Sussex County; et als.,

Appellants,

v.

RICHARD SINCOCK, et als.

On Appeal From the United States District Court for the District of Delaware.

BRIEF FOR THE APPELLEES.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1963.

No. 307.

MABEL V. ROMAN, CLERK OF THE PEACE FOR NEW CASTLE COUNTY, WALTER A. HANDSBERRY, CLERK OF THE PEACE FOR KENT COUNTY; I. ROBERT WILLEY, CLERK OF THE PEACE FOR SUSSEX COUNTY, ET ALS.,

Appellants,

v.

RICHARD SINCOCK, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

BRIEF FOR THE APPELLEES.

OPINIONS BELOW.

The opinion of the Court Below which:

1. Granted a limited stay is reported at 207 Fed. Supp. 205 and appears as A(1) of the Appendix to the jurisdictional statement.[1]

---

1. References to the brief of Appellants will appear as App. B.

References to the Appendix to the Brief of Appellants will appear as Del. App.

References to the Jurisdictional Statement will appear as J. S.

References to the Appendix to the Jurisdictional Statement will appear as J. S. A. —.

Reference to the Appendix to the Brief of the Appellees will appear as Sincock App.

References to the Complaint will appear as Compl., para. —.

2. Denied the Motions to Dismiss is reported at 210 F. Supp. 395 and appears as 9A(2) of the J. S. A. A6-A8.

3. Denied Plaintiffs' Motion for a Preliminary Injunction and Defendants' Motion for a Further Stay is reported at 210 F. Supp. 396 and appears at J. S. A. A8-A16.

4. Held the apportionment provisions of the Constitution of the State of Delaware of 1897 and the amendments thereto to be unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States is reported at 215 F. Supp. 169 and appears at J. S. A. A16-A67.

JURISDICTION.

The opinion of the statutory court was filed on April 17, 1963 (J. S. A. A16-A67). The decree thereon was entered on April 30, 1963 (J. S. A. A68). Notice of Appeal to this Court from such final Order was filed on May 28, 1963.

A permanent injunction issued on May 20, 1963 (J. S. A. A69). The Defendants' Motion for a Stay of that injunction was denied in an Order entered June 10, 1963. On June 12, 1963, the Defendants Below filed their Notice of Appeal to this Court appealing from the injunction of May 20, and the Order of June 10, 1963, denying the stay of the injunction pending the appeal. On June 27, 1963, Mr. Justice Brennan stayed the injunction of May 20, 1963 pending the perfection of the appeals and the final disposition by this Court. Probable jurisdiction was noted by this Court on October 21, 1963. The jurisdiction of this Court rests upon 28 U. S. C., Secs. 1253 and 2101(b).

QUESTIONS PRESENTED.

1. Whether the apportionment provisions contained in Article II, Section 2 of the Constitution of the State of Delaware of 1897, or the amendment thereto, which apportioned both Houses of the Delaware legislature, violates the Equal Protection Clause of the Fourteenth Amendment by creating gross inequalities in per capita representation without any rational basis.

2. Whether the Court below abused its discretion in entering an injunction restraining the holding of any election pertaining to the members of the General Assembly under Article II, Section 2 of the Constitution of the State of Delaware of 1897 as it existed prior to amendment or as amended, on the ground that such provisions violate the Fourteenth Amendment to the Constitution of the United States.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

1. Section 1 of the Fourteenth Amendment to the Constitution of the United States containing the Equal Protection and Due Process Clause (J. S. A. A71).
2. Section 5 of the Fourteenth Amendment to the Constitution of the United States (J. S. A. A71).
3. Article I, Section 3 of the Constitution of the State of Delaware of 1897.
4. Article II, Section 2 of the Constitution of the State of Delaware of 1897 (J. S. A. A71-A75).
5. Article II, Section 2 of the Constitution of the State of Delaware of 1897, as amended (J. S. A. A77-A81).
6. Article XVI, Section 1 of the Constituion of the State of Delaware of 1897 (J. S. A. A76-A77).
7. Article XVI, Section 2 of the Constitution of the State of Delaware of 1897 (J. S. A. A76-A77).

STATEMENT OF THE CASE.

1. Apportionment in the General Assembly Under Article II, Section 2 of the Constitution of the State of Delaware, of 1897; The Growth of Population, 1890-1960.

This is a class action brought by seven duly qualified citizens, taxpayers, and voters of urban and suburban New Castle County and the State of Delaware, seeking an adjudication that Article II, Section 2 of the Constitution of the State of Delaware of 1897 and the 1963 Amendment thereto are unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States (Sincock App. 6a; J. S. A. A19).

The Defendants comprise, the Board of Canvass, the Clerks of Peace, the Departments of Election, and their Secretaries of New Castle County, Sussex County and Kent County respectively, and the State Election Commissioner, all of whom perform statutory and constitutional duties relating to the conduct of the general elections in the State of Delaware [2] (Sincock App. 7a; J. S. A. A19).

The Complaint alleges violations of the Civil Rights Act, 42 U. S. C., Sections 1983 and 1988; jurisdiction is asserted under 28 U. S. C., Section 1343. The Plaintiffs sought an injunction and also relief under 28 U. S. C., Section 2201 (Compl. para. 1; Sincock App. 5a-6a).

The Complaint attacked those provisions of the Constitution of the State of Delaware of 1897 which provide for the apportionment of seats in the General Assembly of the State of Delaware—the State's bicameral legislative body (Sincock App. 3a; J. S. A. A18) Article II, Section 2 as it existed at the time of suit, divided Delaware into

2. The Chancellor of Delaware and the Judges of the Superior Court of the State of Delaware, Members of the Boards of Canvass, in their Answers concluded that it would be inappropriate to take a position on the merits but that they would continue to discharge the duties imposed upon them by the Constitution of the State of Delaware unless restrained by lawful order of the Court below. They have not appealed from either the Final Decree, the Injunction, or the Denial of the Motion to Stay filed by the other Defendants, (J. S. A. A18).

thirty-five (35) geographical representative districts, and seventeen (17) geographical senatorial districts[3] (Sincock App. 7a; J. S. A. A20).

The boundaries of both the representative and senatorial districts were specifically described in the Constitutional provisions and no provision was made for their alteration (Sincock App. 7a-8a; J. S. A. A20). The qualified voters of each representative district elect one representative, and the qualified voters of each senatorial district elect one senator (Sincock App. 7a; J. S. A. A20). The apportionment in both instances was made on the basis of geographical districts and not to counties (J. S. A. A71-A75, A77-A81). This apportionment was the result of the Constitutional Convention convened on December 1, 1896, and became effective June 10, 1897 (Section 2, Schedule of the Constitution of the State of Delaware, of 1897 (Sincock App. 7a-8a; J. S. A. A20).

At the time of the adoption of the Constitution, the population of Delaware was approximately 180,000 inhabitants of which 105,000 resided in New Castle County, 70,000 of whom resided in the City of Wilmington, 35,000 resided in rural New Castle County, and 32,000 resided in Kent County, and 38,000 resided in Sussex County (Sincock App. 8a; J. S. A. A20-A21). When the Constitution of 1897 was adopted, the inhabitants of the rural areas of New Castle, Kent and Sussex Counties were considered to be identical in their occupations and vocations, and population in such areas was substantially equal (Sincock App. 8a; J. S. A. A21). The Convention apportioned the rural areas into ten representative districts and five senatorial districts in the General Assembly (Sincock App. 8a; J. S. A. A21). Wilmington, with a population of 70,000 persons, was accorded special consideration and allotted five representatives in the House of Representatives and two senators in the Senate of the General Assembly (Sincock App. 9a; J. S. A. A21).

3. The senatorial districts were in large measure combinations of smaller representative districts (J. S. A. A73-A75).

By April 1, 1930, according to the 15th Decennial Census of the United States, the population of Delaware had increased to 238,380 which represented an increase of 15,374 or 6.9%, as compared with the population on January 1, 1920 (Sincock App. 9a; J. S. A. A21). In 1930, New Castle County had grown to 161,032 inhabitants, of which 106,597 resided in Wilmington, 54,435 resided in rural New Castle County, while Kent County had a population of 31,841, and Sussex County had a population of 45,507 (Sincock App. 9a; J. S. A. A21-A22).

By 1960, the total population of the State of Delaware had increased to 446,292 of which 307,446 resided in New Castle County. Of these, 95,827 resided in Wilmington, and 211,619 resided in rural New Castle County. In the same year, 65,651 persons resided in Kent County and 73,195 persons inhabited Sussex County[4] (Sincock App. 9a; J. S. A. A22). Using the 1897 and 1960 population figures as a basis to calculate the percentage of population growth among the three counties shows: in 1897 rural New Castle County had approximately 20% of the population, Kent County had approximately 18%, Sussex County had approximately 21% of the population and the City of Wilmington had approximately 41% (J. S. A. A22). In 1960, however, rural New Castle County had approximately 47% of the population, Kent County had approximately 14%, and Sussex County had approximately 16%, and the City of Wilmington had approximately 21% (J. S. A. A22).

2. Representation in the House of Representatives of the Delaware General Assembly Under Article II, Section 2 From 1897 Through 1960.

The apportionment of the 35 Representative Districts established by Section 2 of Article II of the Constitution of 1897 as it existed prior to the 1963 Amendment for the years 1890 through 1969 was as follows:[5]

4. See graphic illustration showing population growth of State and Counties 1890-1960: Sincock App. 77a.

5. See illustration: Sincock App. 76a.

Dist.	1890	1900	1910	1920	1930	1940	1950	1960
New Castle County								
The City of Wilmington								
1					11,513	12,262	11,515	7,814
2					31,299	35,082	35,762	33,772
3					21,222	22,843	21,417	18,359
4					9,352	9,877	9,078	5,394
5					31,446	32,440	32,584	30,488
Total	61,431	76,508	87,411	110,168	106,597	112,504	110,356	95,827
New Castle County (*Excluding Wilmington*)								
6	3,994	3,899	4,440	6,451	10,917	14,426	24,039	58,228
7	6,144	4,736	6,038	6,298	14,317	18,696	32,224	47,509
8	3,786	3,728	3,886	4,052	4,453	5,662	7,677	23,428
9	2,870	3,061	3,587	3,921	5,476	6,398	9,057	20,040
10	5,980	5,407	5,406	6,386	8,261	10,245	21,824	40,293
11	2,126	1,999	1,797	1,692	1,881	1,970	2,599	9,325
12	2,216	2,425	2,693	2,351	2,635	2,771	3,053	3,401
13	4,785	4,455	4,237	3,596	3,457	3,685	4,554	5,218
14	2,336	2,141	2,257	2,099	1,939	2,035	2,175	2,534
15	1,514	1,338	1,436	1,225	1,099	1,170	1,321	1,643
Total New Castle County Excluding Wilmington					54,435	67,058	108,523	211,619
Total New Castle County	97,182	109,697	123,188	148,239	161,032	179,562	218,879	307,446
Kent County								
1	4,372	4,228	3,627	3,521	3,229	3,506	4,422	6,084
2			3,046	2,623	3,133	3,530	4,248	17,806
3	2,885	3,144	3,032	2,831	2,586	2,527	2,671	3,361
4			2,709	2,439	2,292	2,502	2,555	3,716
5			3,771	3,927	4,363	5,169	5,052	9,125
6		1,242	2,941	2,500	2,352	2,274	2,168	2,626
7			3,252	3,229	3,393	3,745	3,838	7,880
8			3,331	3,000	3,040	3,200	3,269	5,168
9			3,945	3,920	4,043	4,288	4,418	4,956
10	3,364	3,118	3,067	3,033	3,410	3,700	4,229	4,929
Total Kent County			32,721	31,023	31,841	34,441	37,870	65,651
Sussex County								
1	3,913	4,117	5,060	5,079	5,276	5,936	7,254	9,641
2	2,793	3,456	5,329	4,589	4,329	5,315	5,849	6,439
3	3,223	3,779	5,174	5,346	5,182	6,350	7,815	9,437
4	3,0.	3,132	3,352	2,761	2,955	3,448	4,446	5,318
5	4,511	5,112	5,980	6,362	6,319	6,804	7,139	8,140
6	3,495	3,575	4,979	4,513	4,836	5,779	6,470	8,010
7			4,770	4,016	4,755	5,415	6,195	6,623
8			1,884	1,821	1,803	1,864	2,536	2,957
9	2,436	2,874	3,028	3,071	3,062	3,456	3,563	4,271
10	2,907	3,959	6,857	6,183	6,990	8,135	10,069	12,359
Total Sussex County			46,413	43,741	45,507	52,502	61,336	73,195

(Sincock App. 10a, J. S. A. A23-A24.)

It is stipulated, in the Pre-Trial Order and found by the Court below that the allegations in Paragraphs 21, 22, 23, and 24 contained in the Complaint relating to the disparities of vote and representation in the various districts are true, accurate and correct. Thus, by 1960, as a result of the change in population in the 35 representative districts, they ranged in size from 1,643 inhabitants of New Castle County's 15th Representative District of Blackbird Hundred to 58,228 inhabitants of New Castle County's 6th Representative District of Brandywine Hundred. At the time of the 1962 general election, a vote in the 15th Representative District was equal to one vote in the 6th Representative District in New Castle County, although the population of the latter district is approximately 35 times greater than that of the former [6] (Compl. Paras. 15, 21, 22, 23 and 24; Sincock App. 11a; J. S. A. A24).

Eighteen representative districts with the least population and containing only approximately 18½% of the state's population may elect a majority of the members of the House of Representatives. Inhabitants of the 18 least populated representative districts are less in number than those of the two districts having the heaviest concentration of population; nevertheless, the former elect eighteen representatives in the House of Representatives, while the latter elect but two representatives in the House of Representatives of the Delaware General Assembly (Compl. Para. 23, Sincock App. 11a; J. S. A. A25).

The 1960 census shows that more than one-half of the entire population of the State of Delaware, 233,718 persons, live in six representative districts, with the representatives of those districts having the same voting power in the General Assembly as the representatives of 16,552 persons residing in the six least populous representative districts

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6. For comparative value of vote for representation see: Sincock App. 78a.

of the State of Delaware[7] (Compl. Para. 24, Sincock App. 11a; J. S. A. A25).

3. Representation in the Senate of the Delaware General Assembly Under Article II, Section 2 from 1930 to 1960.

A similar situation existed prior to the 1963 Amendment with regard to the senatorial districts established by the Constitution of 1897. Seven geographical senatorial districts were apportioned to New Castle County, which had a 1960 population of 307,446 as compared with five senators allotted to senatorial districts located in Kent County having a population of 65,651 and with five senators allocated to five senatorial districts in Sussex County with a population of 73,195. Of the seven senators representing districts in New Castle County, five represent rural areas having a population of 211,619. The City of Wilmington, with a population of 95,827 was allotted two senatorial districts and two senators in the General Assembly, as contrasted with five senators each from senatorial districts in Kent, Sussex, and rural New Castle Counties (Compl. Para. 25, Sincock App. 12a; J. S. A. A25-A26).

The seventeen senatorial districts established by Section 2, Article II of the Constitution of the State of Delaware of 1897 as existed prior to the amendment varied greatly in the number of inhabitants residing in them. The population of these districts from 1930 through 1960, with the percentage of change in each was as follows:[8]

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7. See comparison of representation Counties with greater than 100,000 inhabitants *vis-à-vis* Counties with less than 100,000 inhabitants: Sincock App. 79a.

8. For graphic presentation showing population per Senatorial District see: Sincock App. 82a.

		Population				% Change		
County	*Dist.*	*1930*	*1940*	*1950*	*1960*	*1940/ 1930*	*1950/ 1940*	*1960/ 1950*
New Castle	1	52,521	57,925	57,089	52,131	+ 10	— 1	— 9
	2	54,076	54,579	53,177	43,696	+ 1	— 3	— 18
	3	12,778	16,856	28,228	64,345	+ 32	+ 67	+ 128
	4	16,909	21,928	35,712	64,829	+ 30	+ 63	+ 81
	5	16,372	19,414	33,934	63,734	+ 19	+ 75	+ 88
	6	5,338	5,655	7,153	14,543	+ 6	+ 26	+ 103
	7	3,038	3,205	3,496	4,177	+ 5	+ 9	+ 19
Kent	1	6,362	7,036	8,670	23,890	+ 11	+ 23	+ 176
	2	4,878	5,029	5,226	7,077	+ 3	+ 4	+ 35
	3	7,756	8,914	9,890	17,005	+ 15	+ 11	+ 72
	4	6,395	6,562	6,586	7,582	+ 3	—	+ 15
	5	6,450	6,900	7,498	10,097	+ 7	+ 9	+ 35
Sussex	1	9,605	11,251	13,103	16,080	+ 17	+ 16	+ 23
	2	8,137	9,798	12,261	14,755	+ 20	+ 25	+ 20
	3	11,155	12,583	13,609	16,150	+ 13	+ 8	+ 19
	4	6,558	7,279	8,731	9,580	+ 11	+ 20	+ 10
	5	10,052	11,591	13,632	16,630	+ 15	+ 18	+ 22

(Sincock App. 12a; J. S. A. A26.)

The 17 senatorial districts varied in 1960 from approximately 65,000 to approximately 4,000 inhabitants (Sincock App. 13a; J. S. A. A26). The vote in the General Assembly of the smallest senatorial district was equal to that of the largest senatorial district which exceeded it in numbers of population by more than 21 times (Sincock App. 13a; J. S. A. A27).

The apportionment established by the Constitution with respect to the Senate permitted 22% of the voters of the State of Delaware to elect a controlling majority in the Delaware Senate (Compl. Para. 25; Sincock App. 13a; J. S. A. A27).

The combined percentage of vote necessary to control both the Senate and the House of Representatives of the General Assembly of the State of Delaware establishes Delaware as ranking among the least representative of the states (Compl. Exhibit C).

The uneven growth of the different areas of the State created a condition in which the numbers of inhabitants in

both representative and senatorial districts differed not only on an *intercounty* basis but also on an *intracounty* basis (Sincock App. 13a; J. S. A. A27). Differences also manifested themselves in the representative districts within the City of Wilmington. For example the 4th Representative District of Wilmington, having 5,394 inhabitants, had the same representation in the House of Representatives of Delaware as the 2nd Representative District with 33,772 inhabitants and the 5th Representative District with 30,488 inhabitants (Sincock App. 13a; J. S. A. A27).

4. The Amendment of 1963.

Subsequent to the commencement of this action, the legislature accomplished an amendment to Section 2, Article II of the Constitution (Sincock App. 13a; J. S. A. A27-A31, A77-A81). The Amendment was passed by two consecutive sessions of the General Assembly.

The effect of the Amendment on the apportionment of the Senate is to freeze the senatorial representation in the seven existing districts in New Castle County and to create two additional senatorial districts in each of Kent and Sussex Counties, increasing the total number of senatorial districts throughout the State from 17 to 21[9] (Sincock App. 13a-14a; J. S. A. A31, A78). Thus, according to the provisions of the Amendment, there would exist 7 senatorial districts in each of the 3 counties (Sincock App. 15a, A34). The Amendment's effect on the House of Representatives is to create 10 additional districts by dividing the existing, more populous districts, and by providing for additional representation for each increment of 15,000 population residing therein, or any major fraction thereof[10] (Sincock App. 13a-14a; J. S. A. A31).

The Amendment, in addition to accomplishing the above, provides further that the composition of any future

9. For graphic illustration showing population of each senatorial district according to the amendment see: Sincock App. 84a.

10. For graphic illustration showing population of each representative district according to the Amendment see: Sincock App. 83a.

Constitutional Convention shall not change because of the reapportionment, but shall consist of a delegate from each of the geographical districts set forth in Article II, Section 2 as created by the Constitution of the State of Delaware of 1897, plus two delegates from each County (J. S. A. A71-A75; J. S. A. A31).

(a) Representation in the House of Representatives of the Delaware General Assembly Under the Amendment.

The effect of the amendment upon the existing representative districts in New Castle County is shown by the following chart:

Dist.	*Pop.*		*Effect of Amend.*	*Average Population Per Representative*
1	7,814		Unchanged	7,814
2	33,772	City	Add 1 Representative	16,886
3	18,359	of	Unchanged	18,359
4	5,394	Wilm.	Unchanged	5,394
5	30,448		Add 1 Representative	15,244
6	58,228		Add 3 Representatives	14,557
7	47,509		Add 2 Representatives	15,836
8	23,428		Add 1 Representative	11,714
9	20,040		Unchanged	20,040
10	40,293		Add 2 Representatives	13,431
11	9,325		Unchanged	9,325
12	3,401		Unchanged	3,401
13	5,218		Unchanged	5,218
14	2,534		Unchanged	2,534
15	1,643		Unchanged	1,643

KENT COUNTY

Dist.	*Pop.*	*Effect of Amend.*	*Average Population Per Representative*
1	6,084	None	6,084
2	17,806	None	17,806
3	3,361	None	3,361
4	3,716	None	3,716
5	9,125	None	9,125
6	2,626	None	2,626
7	7,880	None	7,880
8	5,168	None	5,168
9	4,956	None	4,956
10	4,929	None	4,929

Sussex County			
1	9,641	None	9,641
2	6,439	None	6,439
3	9,437	None	9,437
4	5,318	None	5,318
5	8,140	None	8,140
6	8,010	None	8,010
7	6,623	None	6,623
8	2,957	None	2,957
9	4,271	None	4,271
10	12,359	None	12,359

(Sincock App. 10a, 14a-15a; J. S. A. A32.)

The 1963 Amendment does not effect the apportionment of representation to the existing representative districts in either of Kent or Sussex Counties (Sincock App. 15a; J. S. A. A32).

According to the population of the State of Delaware of 1960, the apportionment effected by the 1963 amendment gives rise to disparities in population per representative district in the area of 12 to 1. The ratio of the 15th Representative District of New Castle, the smallest representative district, to that of every other representative district is set forth in the chart below:

New Castle Districts	*Population*	*Ratio to 15th Rep. Dist. of New Castle*
1	7,814	4-1
2A	16,886	10-1
2B	16,886	10-1
3	18,359	11-1
4	5,394	3-1
5A	15,244	9-1
5B	15,244	9-1
6A	14,557	8-1
6B	14,557	8-1
6C	14,557	8-1
6D	14,557	8-1
7A	15,836	9-1
7B	15,836	9-1
7C	15,836	9-1
8A	11,714	7-1
8B	11,714	7-1
9	20,040	12-1
10A	13,431	8-1
10B	13,431	8-1
10C	13,431	8-1
11	9,325	5-1
12	3,401	2-1
13	5,218	3-1
14	2,534	1-½-1
15	1,643	

Kent Districts	*Population*	*Ratio*
1	6,084	3-½-1
2	17,806	10-½-1
3	3,361	2-1
4	3,716	2-1
5	9,125	5-½-1
6	2,626	1-½-1
7	7,880	4-½-1
8	5,168	3-1
9	4,956	3-1
10	4,929	3-1

Sussex Districts	*Population*	*Ratio*
1	9,641	5-½-1
2	6,439	4-1
3	9,437	5-½-1
4	5,318	3-1
5	8,140	5-1
6	8,010	4-½-1
7	6,623	4-1
8	2,957	2-½-1
9	4,271	2-½-1
10	12,359	11-½-1

(J. S. A. A32)

Since no reapportionment is effected in the representative districts of the House of Representatives in either Kent or Sussex Counties, the disparities in population per representative district which there existed prior to the Amendment, continue to exist. These disparities between population per representative district in Kent County are in the order of 7 to 1, and disparities between the population per representative district in Sussex County are in the order of 4 to 1. In New Castle County, the disparities in population per representative district amount to as much as 12 to 1 (Sincoek App. 15a; J. S. A. A32-A33).

The amended apportionment provisions permit but 28% of the population of the State to elect a majority of the House of Representatives. This 28% of the population lives in the 23 smallest representative districts (J. S. A. A33).

The amended constitutional provisions furthermore have the effect of decreasing the representation which the majority of the population had exercised in the Senate of the General Assembly.

(b) Representation in the Senate of the Delaware General Assembly Under the Amendment.

The Amendment results in a Senate composed of the following:

NEW CASTLE COUNTY

Dist.	Population Per Senatorial District	Effect of 1963 Amendment	Average Pop. Per Senate Dist.
1	52,131	Unchanged	
2	43,696	Unchanged	
3	64,345	Unchanged	
4	64,820	Unchanged	
5	63,734	Unchanged	43,921
6	14,543	Unchanged	
7	4,177	Unchanged	
Total	307,446		

KENT COUNTY

1	23,890	Unchanged	
2	7,077	Unchanged	
3	17,005	Unchanged	
4	7,582	Unchanged	
5	10,097	Unchanged	9,378
6	46,063	Newly Created	
7	19,584		
Total	65,651		

SUSSEX COUNTY

1	16,080	Unchanged	
2	14,755	Unchanged	
3	16,150	Unchanged	10,456
4	9,580	Unchanged	
5	16,630	Unchanged	
6	38,975	Newly Created	
7	34,220		
Total	73,195		

(Sincock App. 15a; J. S. A. A34.)

The population disparities in New Castle County in the 7 senatorial districts range from 4,177 in the 7th Senatorial District to 64,820 inhabitants in the 4th Senatorial District, thus giving rise to a situation where the vote of a person residing in the 7th Senatorial District has more than 15 times the voting power of a resident of the 4th Senatorial District of New Castle County (Sincock App. 16a; J. S. A. A34).

In Kent County the population disparities between districts range from 7,077 inhabitants in the 2nd Senatorial District to 46,063 inhabitants in the 6th Senatorial District, or a ratio of 6½ to 1. In Sussex County, the population disparities between districts range from 9,580 in the 4th Senatorial District to 38,000 in the 6th Senatorial District, or a ratio of more than 4½ to 1. The average population for each senatorial district in the three Counties range from 43,921 in New Castle County for each senator elected to 9,378 in Kent County or a ratio of more than 4½ to 1 between the Counties (Sincock App. 16a; J. S. A. A34).

The election of 7 senators in each county irrespective of population and on the basis of the formula provided by the Amendment to the Constitution creates a situation whereby Kent County with 14½% of the total population of the State of Delaware will elect one-third of the members of the Senate, Sussex County with 16½% of the total population will elect ⅓ of the Senate, while New Castle County with about 69% of the total population will elect ⅓ of the members of the Senate (Sincock App. 16a; J. S. A. A35).

In creating the two additional senatorial districts in each of Kent and Sussex Counties, the legislature has added two at-large senatorial districts in each of these counties. The two at-large senatorial districts are superimposed on existing senatorial districts. By reason of this, each resident of New Castle County is entitled to vote for and elect one senator in the General Assembly of Delaware while each inhabitant of Kent and Sussex County is entitled to vote for and elect two senators to represent him

in the General Assembly (Sincock App. 16a-17a; J. S. A. A35).

5. Tax Revenues Contributed by New Castle, Kent and Sussex Counties in the Decade 1952 to 1961.

In the decade from 1952 through 1961, the State Tax Commission has collected a total of $239,000,000 of which $166,900,000 represented personal income taxes, $23,500,000 represented inheritance and estate taxes, $10,800,000 represented license fees and $16,190,000 represented cigarette and cigar tax collections [11] (Sincock App. 17a-18a; J. S. A. A35-A36). The State Tax Commission Reports demonstrate that in excess of 92% of the total taxes are collected in New Castle County, that 3% are collected in Kent County and 5% are collected in Sussex County. Of the $166,900,000 collected for personal income taxes, approximately 92% were collected in New Castle County, 3% were collected in Kent County and 5% were collected in Sussex County. Of the $23,500,000 collected for inheritance and estate taxes, approximately 94% was collected in New Castle County, 2% was collected in Kent County and 4% was collected in Sussex County. Of the $10,800,000 collected for licenses, approximately 70% was collected in New Castle County, 12% was collected in Kent County and 18% was collected in Sussex County. Of the $16,190,000 collected by the Commission for cigarette and cigar taxes, 73.3% was collected in New Castle County, 12.4% was collected in Kent County and 13.3% was collected in Sussex County (Sincock App. 17a; J. S. A. A35-A36).

Collections made by the State Tax Commission over the same period indicate that exclusive of franchise and corporation taxes, the amounts collected by the Commission average approximately $13,000,000 per representative in New Castle County, less than $1,000,000 for each representative elected in Kent County and approximately

11. For graphic illustration see Sincock App. 81a.

$1,000,000 for each representative elected in Sussex County.[12] In the same period, New Castle County collected $10,500,000 in personal income taxes for each representative, while Kent County collected less than $500,000, and Sussex County collected approximately $800,000 per representative (Sincock App. 18a; J. S. A. A36-A37).

Further results of the Constitutional Amendment are that the combined voting strength of Kent and Sussex Counties in the Senate enables them to override the executive veto and gives to Kent and Sussex Counties with but 31% of the State population the ability to control measures requiring ⅔ vote in the Senate, including revenue measures and appointments by the Governor (Sincock App. 19a; J. S. A. A37).

6. Futile Efforts to Achieve Legislative Reapportionment in the Absence of a Controlling Court Decision.

Neither in the Delaware Constitution nor in the statutes is there any provision for reapportioning the General Assembly (J. S. A. A15). The Delaware Constitution does not provide for either initiative or referendum (Sincock App. 8a). The only procedures contained in the Constitution which would permit a change in the General Assembly is to be found in Article XVI, of the Constitution of 1897. To proceed by amendment, it is necessary that the same be agreed to by ⅔ of all the members elected to both the Senate and the House of Representatives. Thereafter, the Secretary of State is required to publish the proposed amendment three months prior to the next general election, and if the General Assembly next after the said election shall agree to the proposed amendment by ⅔ of all the members elected to each House, the Amendment becomes a part of the Constitution (Constitution, State of Delaware, Art. XVI, § 1). It is also provided that the General Assembly by a ⅔ vote of all its members elected to each House

12. For graphic illustration see: Sincock App. 80a.

may from time to time provide for the submission to the qualified electors of the State at a general election next thereafter the question, "Shall there be a convention to revise the Constitution and amend the same?". If a majority voting on the question decide in favor of the convention, the General Assembly at its next session provides for the election of delegates to the Convention at the next General election. Under the Constitution of 1897, the Convention is to be composed of 41 delegates, one of whom shall be chosen from each representative district, and two shall be chosen from each of the counties. A majority of the Convention constitutes a quorum for the transaction of business. The Convention has the power to appoint its officers and assistants and to determine the rules of its proceedings, and to be the judge of the election, returns, and qualifications of its members (Constitution, State of Delaware, Art. XVI, § 2; J. S. A. A79).

The futility of the efforts to have the legislature reapportion itself in the absence of a controlling court's decision has been clearly demonstrated in the Delaware General Assembly. The reluctance of the down-state majority to adopt any measure relating to reapportionment is a matter of public notoriety and record in this state. Since 1957, at least six bills dealing with reapportionment have died in Committee (Sincock App. 18a-19a).

In 1959, House Bill 164 providing for reapportionment was referred to Committee and died. A similar fate befell House Bill 165 which related to reapportionment of the House of Representatives. In 1961, House Bill 361 seeking to reapportion the House of Representatives was referred to Committee and died. In 1962, Senate Substitute Bill #2 for Senate Bill #3 advocating a reapportionment of the General Assembly was also referred to Committee and died. In 1962, Representative Bartleson introduced a substitute Bill for Senate Bill #3. This also was referred to Committee and expired (Affidavit of Margaret T. Manning, Senator from the 4th Senatorial District).

In addition, two calls for Constitutional Conventions have been rejected. These are identified as House Bill 116 and Senate Bill 365. In 1957, the only reapportionment bill ever to be voted out of committee was defeated by a vote of 4 to 10. Of the votes cast in favor, 3 of the 4 were from rural New Castle County, and 8 of the nay votes were cast by representatives from Kent and Sussex Counties. Aside from the unconstitutional amendment of 1963, following the institution of this action, all efforts to obtain a substantial apportionment of the General Assembly have met with failure. It is significant, we believe, to note the 1963 Amendment provided that representation in a constitutional convention, if the legislature finally did convene one, would be on the basis of representation which now exists in the General Assembly, and which of course dates back to 1897. The reluctance of the minority areas of the State to surrender their stranglehold on the apportionment of the General Assembly is clearly shown by Mr. Wilson's admission that such provisions were written into the Amendment of 1963 in order to make it "exceedingly clear" that there would not be a reapportionment of the delegates to the Constitutional Convention which might consider reapportionment (Sincock App. 73a).

7. The Proceedings Below.

The Plaintiffs-Appellees are residents of four representative districts and four senatorial districts of the State of Delaware and are qualified voters, and tax payers of the State and citizens of the United States. Defendants-Appellants are election officials of the State of Delaware. Plaintiffs, who filed suit June 5, 1963, sought a declaratory judgment that the existing representation as then provided in Article II, Section 2 of the Constitution of the State of Delaware of 1897 violated Section 1 of the Fourteenth Amendment. In addition to seeking declaratory relief, appellees asked for injunctive relief against the conduct of

the 1962 elections to the Delaware General Assembly and thereafter. They also sought a decree of the District Court reapportioning both houses of the Delaware General Assembly in accordance with Article I of Section 3 of the Constitution [13] and submitted a plan in the course of trial which, if decreed by the Court below would grant them and the other citizens of Delaware, similarly situated, the relief sought.

On July 25, 1963, the District Court granted the Defendants a limited stay to permit the legislature, which had been recalled by the Governor, an opportunity of enacting bills recommended by a Bipartisan Committee on Reapportionment (J. S. A. A1). The report recommended (1) a constitutional amendment to Article II, Section 2 allotting senators on a geographical basis and representatives on a predetermined population basis, and (2) the acceleration of the date for a Constitutional Convention. The stay was granted until August 7, 1963. On July 30, 1962 the General Assembly enacted the proposed Amendment to Article II, Section 2 but failed to provide for an accelerated Convention. Thereafter on August 7, 1963, the Court denied Defendants' Motion to Dismiss (J. S. A. A6). On October 8, 1962, the Plaintiffs amended their Complaint asking the Court to declare the proposed Amendment to Article II, Section 2 unconstitutional for the same reasons asserted for the invalidation of Article II, Section 2. On October 16, 1963, the Court denied the Plaintiffs' Motion for a Preliminary Injunction against the conduct of the general election for the General Assembly of November 6, 1963, and also denied Defendants' Motion for Further Stay (J. S. A. A8). The Court next fixed a date and an extensive pre-trial hearing was held. This resulted in a comprehensive order and trial of five days (Sincock App. 2a-29a).

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13. Article I, Section 3 of the Constitution of the State of Delaware of 1897, which is a part of the Bill of Rights, provides:

"Section 3. All elections shall be free and equal."

8. The Decision of the District Court.

On April 17, 1963, the Court filed its opinion (J. S. A. A16-A67). The Court held that Section 2 of Article II as it existed before and after the 1963 Amendment was invalid and unconstitutional. In reaching this conclusion, the Court found that the Plaintiffs have standing to maintain the suit, that the cause of action is cognizable under federal law, and the Court has jurisdiction of the subject matter and the parties; that Section 2 of Article II both before and after amendment creates such an inequality in voting power as results in invidious discrimination, as to bring it within the proscription of the Fourteenth Amendment and this was true as to the apportionment of both the House of Representatives and the Senate of the General Assembly. More specifically, it held that in the apportionment of the House of Representatives the basis must be one of population. One vote, one person must be the aim (J. S. A. A-40-A41), and that population must be given the "heaviest weight" in the apportionment of the Senate. Some weight might be given to other factors such as diverse interests, county governmental functions, geography, area, historic and economic differences, provided, however, that no wide deviation from the principle of population representation will be permitted. The Court rejected the Federal analogy argument, took judicial notice of the diminution of the powers of the counties and concluded that the creation of a Senate on such basis would be unrealistic (J. S. A. A45). The Court also concluded that a further opportunity must be given the General Assembly to reapportion itself in accordance with the guide lines appearing in the opinion. A Stay until October 1, 1963, was entered for such purpose. The opinion, delivered by Judge Biggs, was concurred in by Judge Wright. Judge Layton concurred in the result and adopted the view that the House must be apportioned strictly on a population basis, and he felt it unnecessary to

proceed further because the whole act must fall because of its inseverability. Judge Layton was of the opinion that there is nothing constitutionally wrong if one House is elected upon a strict population basis, to elect members to the Upper House in equal numbers from each county, as a *minimum* standard. He also concluded that no valid reason exists why a county having a very large population should not have more senators than a much smaller county (J. S. A. A65).

The declaratory Decree below was entered on April 30, 1963 (J. S. A. A68).

SUMMARY OF ARGUMENT.

I.

A. The Equal Protection Clause of the Fourteenth Amendment guarantees the Plaintiffs and all others similarly situated against arbitrary and unreasonable discrimination in the apportionment of the General Assembly of the State of Delaware. Arbitrary discrimination among voters with respect to their opportunities for participation in elections and other processes of government violate the Fourteenth Amendment. The explicit holding of this Court in *Baker v. Carr*, 369 U. S. 186 recognizes that these principles are applicable to the apportionment of a state Legislature.

B. The well-developed and traditional tests of the Fourteenth Amendment are available to determine whether invidious discrimination exists in the representation of a citizen of a state in the Legislature of that state. The basic standard of comparison is the representation afforded qualified voters per capita in both Houses of the General Assembly. If the apportionment scheme creates substantial deviations from per capita equality and such deviations result from an apportionment having no rhyme or reason, invidious, arbitrary and capricious discrimination results which violates the Fourteenth Amendment. This Court plainly has the power to determine whether on the facts of each case discrimination exists, and if it does not, whether it reflects no policy, but simply arbitrary and capricious action. *Baker v. Carr*, 369 U. S. 186, 226.

C. Applying the foregoing principles to the facts in the Delaware litigation, shows that invidious discrimination exists in the representation of both Houses of the General Assembly of the State of Delaware; that unconstitutional

discrimination in the rights of suffrage exist as a result of the present composition of the Delaware General Assembly as prescribed by Article II, Section 2 of the Constitution of the State of Delaware of 1897.

New Castle County with 69% of the total population is represented in the House by 15 representatives while Kent and Sussex Counties, with but 14½% and 16½% respectively of the total population, are each represented by 10 representatives. Prior to the Amendment of 1963, 18½% of the total state population could elect a majority in the House. A similar situation exits in the Senate where districts in New Castle County elect 7 senators and districts in Kent and Sussex County elect 5 each. Prior to the Amendment of 1963, 22% of the state's population could elect a majority in that body. Numerous gross disparities exist, not only between classes of political subdivisions, but also within classes. For example, the Sixth Representative District of Brandywine Hundred, with a population of 58,228 inhabitants, has one representative, while the Fifteenth District of New Castle County, having 1,643 inhabitants, has one representative, even though a disparity of 35 to 1 exists between the two districts. Disparities exist throughout the three counties and in the City of Wilmington. For example, the Fourth District of New Castle in Wilmington has but 5,394 inhabitants, while the Fifth District in Wilmington immediately adjacent has 30,000 inhabitants, or a ratio of approximately 6 to 1. In Kent County the Second Representative District has over 17,000 inhabitants and the Sixth District has but 2,600. In Sussex County, the Eighth District has but 2,900 inhabitants while the Tenth District has over 12,000.

In the Senate, prior to the 1963 Amendment, the City of Wilmington, with over 95,000 was alloted two senators; rural New Castle County, with a population of 211,000, was alloted 5 senators, while Kent County with but 65,000 and Sussex County with but 73,000, each were alloted 5 senators. The 17 senatorial districts ranged from 4,177 to

64,820 or approximately 16 to 1. This apportionment permitted 22% of the voters to elect a controlling majority in the Delaware Senate.

The Amendment of 1963 had the effect of subdividing the larger representative districts which had a population in excess of 22,501. It retained all of the remaining smaller districts intact. Disparities in population per representative district in New Castle County remains at over 12 to 1, at over 3 to 1 in Wilmington, at over 7 to 1 in Kent County, and at over 4 to 1 in Sussex County. Furthermore, disparities in almost all cases are therefore found in districts that adjoin one another. The long range effect is to guarantee disparities which will far exceed the Fourteenth Amendment test. It will continue to permit 28% of the population of Delaware to elect a majority in the House. These representatives residing in the 23 smallest districts under the Amendment. In the Senate, less than 22% of the population may elect a majority. The Amendment continues the population disparities that previously existed in New Castle County on a ratio of more than 15 to 1, and increases the population disparities in both Kent and Sussex Counties from 6½ to 1 and 4½ to 1 respectively. The average population per senatorial district will range from 43,921 in New Castle County to 9,378 in Kent or a ratio of more than 4½ to 1 between counties. Kent with 14½% of the state population will elect ⅓ of the Senate, Sussex with 16½% of the state population will elect ⅓ of the Senate, and New Castle County with 69% of the state population will elect one-third of the Senate. Furthermore, under the Amendment, the residents of Kent and Sussex County will each be permitted to elect 2 senators while those in New Castle County can elect but one.

D. & F. In the instant case, the gross inequalities that exist cannot be justified upon the ground that Delaware's policy is to have senators represent counties rather than people, for the Constitution of 1897 allocated representa-

tion in the State's senate on a geographical senatorial district basis rather than on a county basis. Furthermore, the City of Wilmington is given 2 senators and 5 representatives from districts which lie within its boundaries. Moreover, the history of Delaware does not appear to sustain the contentions that the counties of Delaware had, at any time, sovereignty. It reflects to the contrary that from their inception, the 3 counties were owned by William Penn as a proprietor under two deeds of James, Duke of York, and that it was governed by a General Assembly, the seat in Philadelphia, and later in New Castle, where it enacted such laws as were required, subject to the control of the Crown who was represented by a Governor or Lieutenant Governor; that it was bound together by its General Assembly, the Proprietor, and the Crown's representative. Its history further shows that whatever authority the counties may have had prior to 1787, when Delaware was the first state to ratify the Constitution, the powers of the counties have steadily diminished until today they represent an integral part of the State Government, but are subject to the power of the State Legislature upon which they must depend for their authority and continued existence. It would appear therefore that any reliance upon such federal analogy to substantiate the disparities that exist in the General Assembly of Delaware is misplaced.

We believe that this Court's application of the Fourteenth Amendment with respect to legislative apportionment scheme is clearly correct.

E. An examination of contemporaneous congressional legislation discloses nothing about the scope of the Equal Protection Clause of the Fourteenth Amendment in this area because of its inconclusive nature and also because the problem of legislative apportionment was not critical at the time of the ratification of the Fourteenth Amendment, and finally, because the Fourteenth Amendment has been most elastic in conforming to the time its use seems appropriate.

II.

The Court below, having declared the apportionment provisions invalid under the Fourteenth Amendment, was required to afford the Plaintiffs appropriate relief. While the Plaintiffs had asked for the reapportionment by judicial decree, this was denied by the Court which followed the traditional remedy of equity in such cases by entering a permanent injunction which restrained the Defendants from conducting a general election for the election of the General Assembly under the invalid provisions of the Constitution of 1897 and the Amendment of 1963. This was proper, equitable relief, which in no way constituted an abuse of discretion. It was relief which the Plaintiffs were entitled to and was given by the Court in the due course of an orderly procedure totally lacking the pressures, haste, and compulsion imagined by counsel for the Appellants who had not participated in the proceedings prior to this Appeal. Having declared the apportionment provisions of the Constitution to be invalid, the Court further freed the hands of the General Assembly of the State of Delaware to enact apportionment provisions that would fall within the guide lines which it established at the request of counsel for the Defendants and to restore to the Plaintiffs their present rights to representation in accordance with the provisions of the Equal Protection Clause.

Argument.

I.

THE EQUAL PROTECTION CLAUSE IS VIOLATED BY THE GROSS INEQUALITIES IN PER CAPITA REPRESENTATION WITHOUT ANY RATIONAL BASIS WHICH EXISTS UNDER ARTICLE II, SECTION 2 OF THE CONSTITUTION OF THE STATE OF DELAWARE BOTH BEFORE AND AFTER AMENDMENT.

A. The Guarantees of the Fourteenth Amendment Are Applicable to the Apportionment of State Legislatures.

The Fourteenth Amendment protects a voter's right to cast a ballot without unfair impairment or invidious discrimination in the exercise of suffrage. *Gray v. Saunders*, 372 U. S. 368, 375; *Smith v. Allwright*, 321 U. S. 649; *Terry v. Adams*, 345 U. S. 461.

In *Baker v. Carr*, 369 U. S. 186, this Court explicitly announced that the Equal Protection Clause imposes substantive limitation upon the power of a state to dilute the value of franchise of some voters as opposed to others by arbitrary and other discriminations in the apportionment of seats in a state legislature. It decided much more than jurisdictional questions. In the words of one observer: "* * * Only the willfully blind could fail to see an invitation, if not a command, to the reordering of State legislative apportionment laws and practices." McKay, *The Federal Analogy and State Apportionment Standards*, Notre Dame Lawyer, Aug. 1963, P. 487.

Mr. Justice Brennan in a footnote to his opinion referred to "our holding that the Complaint states a federal constitutional claim of violation of the Equal Protection Clause." *Baker v. Carr*, 369 U. S. 186, 195. Justice Douglas, in a separate concurring opinion flatly stated, "If the

allegations in the Complaint can be sustained, the case for relief is established" (Id. 245). Mr. Justice Clark, finding that the Tennessee apportionment was a crazy-quilt without rational basis concluded that, "The Tennessee apportionment statute offends the Equal Protection Clause . . ." (369 U. S. at 258).

Baker stated the rule that gross dilutions of voting rights which result from unlawful geographical discriminations, whether the result of purposeful action or inaction, can lead to limitations that exceed constitutionality. This was the holding of the Court below, which is supported by the overwhelming majority of the state and lower federal courts which have considered the question since *Baker v. Carr*, 369 U. S. 186.[14]

We think it beyond doubt at this point that the guarantees of the Fourteenth Amendment were established in the *Baker* case as being applicable to the apportionment of State legislatures.

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14. See: *Baker v. Carr*, 206 F. Supp. 341 (M. D. Tenn.); *Sims v. Frink*, 208 F. Supp. 431 (M. D. Ala.); *Lisco v. McNichols*, 208 F. Supp. 471 (D. Colo.); *Sobel v. Adams*, 208 F. Supp. 316 (S. D. Fla.); *Thigpen v. Meyers*, 211 F. Supp. 826 (W. D. Wash.); *Toombs v. Fortson*, 205 F. Supp. 248 (N. D. Ga.); *WMCA, Inc. v. Simon*, 208 F. Supp. 368 (S. D. N. Y.); *Moss v. Burkhard*, 207 F. Supp. 885 (W. D. Okla.); *Mann v. Davis*, 213 F. Supp. 577 (E. D. Va.); *Wisconsin v. Zimmerman*, 209 F. Supp. 183 (W. D. Wis.); *League of Nebraska Municipalities v. Marsh*, 209 F. Supp. 189 (D. Neb.); *Davis v. Synhorst*, 217 F. Supp. 492 (S. D. Iowa); *Nolan v. Rhodes*, U. S. D. C., S. D. Ohio; *Caesar v. Williams*, 371 P. 2d 241 (Idaho Sup. Ct.); *Maryland Committee for Fair Representation v. Tawes*, 228 Md. 412, 180 A. 2d 656; *Maryland Committee for Fair Representation v. Tawes*, 229 Md. 406, 184 A. 2d 715; *Scholle v. Secretary of State*, 367 Mich. 176, 116 N. W. 2d 350; *Levitt v. Maynard*, 104 N. H. 243, 182 A. 2d 897; *Sweeney v. Notte*, 183 A. 2d 296 (R. I. Sup. Ct.); *Harris v. Shanahan*, Dist. Ct., Shawnee Cty., Kan.; *Fortner v. Barnett*, No. 59,965, Chancery Ct. First Judicial Dist. of Hinds Cty., Miss.; *Fishman v. White*, Superior Ct., Suffolk Cty., Mass.; *Jackman v. Bodine*, 78 N. J. Super. 414, 188 A. 2d 642; *Asbury Park Press, Inc. v. Woolley*, 33 N. J. 1, 161 A. 2d 705, 710.

B. The Well-Developed and Traditional Tests of the Fourteenth Amendment Are Available to Determine Whether Invidious Discrimination Exists.

In *Baker v. Carr*, 369 U. S. 186, the Court, through Mr. Justice Brennan said:

> "Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action." (Id. 226)

Mr. Justice Douglas in a concurring opinion stated:

> "The traditional tests under the Equal Protection Clause has been whether a State has made 'an invidious discrimination.' . . ." (Id. 244)

The invalidating opinion of the Court below was premised on traditional Fourteenth Amendment concepts, which when applied to Article II, Section 2 of the Constitution of Delaware as it existed prior to and after amendment, evidenced an inequality in voting power which resulted in invidious discrimination and brought such provisions within the proscription of the Fourteenth Amendment. The Court found this to be true as to the apportionment in both Houses of the General Assembly of Delaware (J. S. A. A40). It further concluded that, while mathematical exactitude in apportionment may not be possible in an absolute sense, the disparities created by the Delaware apportionment provisions are of such a startling nature as to demonstrate a debasement of franchise of electors of this State which the equal protection clause cannot tolerate (J. S. A. A41).

In arriving at these conclusions, the Court followed the standard of comparison of per capita equality of representation or the principle of equality and majority rule, i.e., "the concept of political equality from the Declaration of Independence, of Lincoln's Gettysburg Address, to the

Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing, one person, one vote." *Gray v. Saunders*, 372 U. S. 368, 381.

The decision below is a reaffirmation of the degree to which equality and equal treatment in participating in a representative form of government is a fundamental principle of the political philosophy embodied in American institutions and safeguarded by the Fourteenth Amendment. It concluded that the House of Representatives must be apportioned on a population basis with reasonable exactitude and that while other factors such as history, economical conditions, diverse interest, county government functions, geography, and other considerations designated as "area" factors may be considered in the apportionment of the Senate, the aim there, as in the apportionment of the House of Representatives on a state-wide basis, must be one vote, one person (J. S. A. A42-A43).

In formulating the above holding, the Court followed the usual standards for judging the constitutionality of legislative classifications to determine whether the differentiation which it found to exist was arbitrary and unreasonable. *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415; *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78-79; *McGowan v. Maryland*, 366 U. S. 420, 425-426; *Phillips Chemical Co. v. Dumas School District*, 361 U. S. 376, 385; *Morey v. Doud*, 354 U. S. 457, 463-464.

In order to justify a deviation from equality between persons or group of persons, some rational legislative policy must be served by such discrimination. *Goesaert v. Cleary*, 335 U. S. 464. The Court below, after a full trial on the merits, found no rational reason which would support the existing and great disparities in per capita representation and indeed no such offer of proof was made by the Defendants. The burden is on the Defendants to adduce and prove such a rational reason for the proven disparities in per capita representation. *Skinner v. Oklahoma*, 316 U. S. 535, and having so failed to offer any rational justi-

fication, the invalidity of the Constitutional provisions and the Amendment remains apparent and compels the affirmance of the decision below.

C. Invidious Discrimination Exists in Representation of Both Houses of the General Assembly of the State of Delaware.

The composition of the House and Senate of the Delaware General Assembly is established by the provisions of Section 2, Article II of the Constitution of the State of Delaware of 1897. This section, as it existed prior to the 1963 amendment, divided Delaware into 35 geographical districts, and provided that the qualified electors of each district should elect one representative to the House of Representatives. It also divided Delaware into 17 geographical senatorial districts, from each of which a senator was elected by the qualified electors. The section created 15 representative districts, numbered 1 to 15 inclusive, in New Castle County; 10 representative districts, numbered 1 to 10 inclusive, in Kent County, and 10 representative districts, numbered 1 to 10 inclusive, in Sussex County. It also established 7 senatorial districts, numbered 1 to 7, in New Castle County, 5 senatorial districts, numbered 1 to 5, in Kent County, and 5 senatorial districts, numbered 1 to 5, in Sussex County.

At the time of the adoption of the Constitution of 1897, the population of Delaware was 180,000. About 105,000 resided in New Castle County, 70,000 of whom resided in Wilmington, and 35,000 resided in rural New Castle County. 32,000 inhabitants resided in Kent County, and 38,000 persons resided in Sussex County.

The Constitution of 1897 contained no provisions for initiative or referendum. It contained no provisions for a periodic review of apportionment and in point of fact, no modifications of the provisions of Article 2, Section 2 of the Constitution of 1897 were made at the time that this suit was instituted.

In 1960, the total population of Delaware amounted to 440,292 inhabitants, of which 307,446 persons resided in New Castle County. Of these 95,827 resided in Wilmington, and 211,619 resided in rural New Castle County. In the same year 65,651 resided in Kent County and 73,195 resided in Sussex County.

By 1960, as a result of the change in population, the representative districts ranged in size from 1,643 inhabitants of New Castle County's 15th representative district, Blackbird Hundred, to 58,228 inhabitants of the 6th representative district of Brandywine Hundred.

At the 1962 General Election, a vote in the 15th representative district was equal to one vote in the 6th representative district, although the population of the latter was 35 times greater than the former. In the 1962 General Election, 18 representative districts with the least population, and containing approximately 18½% of the state's population, was able to elect a majority of the House of Representatives. The inhabitants of the 18 least populated representative districts are less in number than those of but 2 districts having the heaviest concentration of population, although the former elect 18 representatives in the House of Representatives, and the latter elect but 2 representatives in the House of Representatives.

The 1960 decenial census showed that more than ½ of the entire population of Delaware, 233,718 persons, lived in 6 representative districts, whose representatives in the General Assembly have the same voting power as the representatives of 16,552 persons residing in the 6 least populous districts.

A similar situation existed prior to the 1963 amendment with regard to the senatorial districts established by the Constitution of 1897. The 7 senators were apportioned to New Castle County which had a population of 307,446, as compared with the 5 senators in Kent County, which had a population of 65,651 and the 5 senators in Sussex County, with a population of but 73,195. Of the

7 senators from New Castle County, 5 represented the rural area having a population of 211,619. The City of Wilmington, with a population of 95,827, was allotted 2 senators.

The population of the 17 senatorial districts as they existed prior to the 1963 amendment range from 4,177 to 64,820 or approximately 16 to 1. The apportionment permitted 22% of the voters to elect a controlling majority in the Delaware senate.

Thus, throughout Delaware, through the process of silent gerrymandering, invidious discrimination can be found in both the representative and senatorial districts on both an inter and intra county basis. Differences are also manifest in the City of Wilmington where the 4th representative district, for example, with 5,394 inhabitants, has the same representation in the Delaware House of Representatives as the 2nd District with 33,772 inhabitants, and the 5th Districts with 30,448 inhabitants.

This crazy quilt pattern of apportionment in Delaware is the product of a population explosion in some areas, and complete stagnation in others. The gross inequalities in per capita representation which have arisen in the 66 years since it was promulgated clearly exceed the permissible deviations inherent in the standard Fourteenth Amendment test, and constitute an unreasonable dilution of the voting rights of the citizens of the State of Delaware, and are unconstitutional. The existing disparities are of such sufficient magnitude to rebut even the strongest presumption of constitutionality and to establish the debasement of voting rights which the Fourteenth Amendment forbids. *Lisco v. McNichols*, 208 F. Supp. 471, 478 (D. Colo., 1962).

The amendment of Article II, Section 2 (J. S. A. A77) had the effect of adding ten additional seats in New Castle County by subdividing the districts that had a population in excess of 22,501. It retained all of the remaining geographical districts intact. The effect on the election

of representatives of the House from Kent and Sussex Counties is nil. Giving effect to the amendment, we find that disparities in population per representative district remain in New Castle County at over 12 to 1; at over 3 to 1 in Wilmington; at over 7 to 1 in Kent County; and over 4 to 1 in Sussex County. Furthermore, disparities in almost all cases are to be found in districts that adjoin one another. The long range effect of the Amendment is to guarantee disparities in the population of representative districts, which will far exceed the Fourteenth Amendment tests. Under it, the number of representatives from New Castle County will be approximately 55%, although that County has a total population of 69%. It will, however, continue to permit but 28% of the population of Delaware to elect a majority in the House of Representatives with the 28% residing in the 23 smallest districts under the amendment.

With regard to the Senate, the Amendment will continue population disparities in New Castle County, ranging from 4,177 to 64,820 or a ratio of more than 15 to 1. In Kent County, the population disparities between districts will range from 7,000 to 46,000 or a ratio of approximately 6½ to 1, and in Sussex County, the population disparities will range from 9,500 to 39,000, or a ratio of more than 4½ to 1.

The average population per senatorial district in the three counties will range from 43,921 in New Castle County for each senator elected, to 9,378 in Kent County, or a ratio of more than 4½ to 1 between counties. Under the Amendment, Kent County with but 14½% of the population of the State will elect ⅓ of the Senate; Sussex with but 16½% of the population of the State will elect ⅓ of the Senate; and New Castle County with 69% of the total population of the State will elect but ⅓ of the Senate.

The Amendment by adding two at-large senatorial districts in Kent and Sussex Counties, superimposed on existing districts, permits each Kent and Sussex County voter

to elect 2 senators to represent them in the General Assembly while a voter residing in New Castle County is permitted to elect but one.

Thus, in Delaware where neither initiative nor referendum exists, where no provision is made for periodic reapportionment, and where amendment, either by action of the legislature or by convention, is controlled by the minority in both Houses, and where neither House of the General Assembly is apportioned in accordance with population or per capita representation, disparities of representation exist which do result in the invidious discrimination shown above.

D. The Defendants Can Offer No Rhyme or Reason for the Gross Inequalities in the Representation That Exist Under the Apportionment Plan of the Constitution of 1897 and the Amendment Thereto, and Reliance Upon the So-Called Federal Analogy Is Misplaced.

1. The History of Delaware Is Irrelevant to the Questions Before This Court and Has No Application to the Present Question of Whether the Apportionment of the General Assembly of the State of Delaware Meets the Developed Standards of the Equal Protection Clause.

The Defenses raised are basically three in nature. One is that there is no invidious discrimination. This we have discussed at another point in this brief (pp. 33-37). The second defense asserted is that the apportionment provisions are rational because of a supposed analogy to the federal system by reason of a peculiar historical development of the counties in Delaware. The third defense is that the Fourteenth Amendment was not intended to apply to the apportionment of state legislatures. In reaching this defense, the Defendants seek to invoke the aid of contemporaneous congressional interpretation.

The historical material contained in the Appellants' brief is interesting, but its significance is highly exag-

gerated. For the most part, it is irrelevant to the issue of upholding the decision of the District Court. The issue before the Court below, and indeed before this Court, is whether the Delaware legislature as apportioned by the 1897 Constitution and as apportioned by the 1963 Amendment is constitutional under the developed standards of the Equal Protection Clause. We have shown in the Statement of the Case that disparities of representation resulting in invidious discrimination against the Plaintiffs and others similarly situated, are clearly established by the crazy-quilt pattern of apportionment contained in the Constitution and the Amendment. The Court below held in an opinion reached after an exhaustive trial of the facts, which are almost ignored in the Appellants' brief, that Article II, Section 2 and the Amendment both violated the Fourteenth Amendment of the Constitution of the United States.

As alleged justification, the Appellants here seized upon a quotation from the publication, *One Man, One Vote, A Statement of Basic Principles of Legislative Apportionment*, Twentieth Century Fund, 1962 (App. B, 33) to argue that the federal analogy of area of representation in the Senate of the United States is applicable in Delaware because of the supposed creation of state by three existing sovereign counties in 1776.

We think it not inappropriate to point out that whatever the legal status of the counties might have been in 1776, this case is concerned with the State of Delaware and the acts of legislature of the State of Delaware in denying equal protection of the law to citizens of the State of Delaware. The issue is not an abstract one over "county sovereignty" that may or may not have existed in the eighteenth century, but the rights of individuals presently existing in the twentieth century.

Moreover, if the county history of Delaware is of any moment to this Court, we believe that its history is such as to deny the theory of county sovereignty.

The counties of today are an integral part of the state. They have, however, no attributes of sovereignty at the present time, if ever they did. Originally the area of the state was divided into but two counties; New Castle in the north settled by the Swedes and English and Whorkill in the southern or lower portion of the state settled by the Dutch. In 1680 the third county was created by dividing Whorkill and by creating St. Jones County. 2 Scharf, *History of Delaware*, p. 1028. In 1682 after Penn had acquired a proprietory right to the area the names of the counties were changed to Kent and Sussex.

The governmental organization of the counties may be traced to Captain William Markham, the cousin of William Penn, the proprietor, who was commissioned on August 10, 1681 to establish a council of nine members in New Castle to set boundaries, to establish the courts and to organize a government under the proprietor. Manlove Hayes, *William Penn and His Province*, Historical Society of Delaware 1898, p. 22.

Under William Penn the three counties then known as the territories were united with the Province of Pennsylvania by virtue of the Act of Union of December 10, 1682 in order that residents of the three lower counties may live "under the same law and government that the inhabitants of the providence of Pennsylvania should enjoy." Vol. I, *Delaware Register, Annals of Delaware*, p. 290. Delaware was thus united with the providence of Pennsylvania in the person of the proprietor, the royal Governor and a common legislative body. This union proved to be tempestuous and temporary, and as a result of numerous sectional quarrels and debates, Penn was temporarily deprived of his control and a royal colony was established. Penn was reinstated as proprietory and in November of 1704 the counties of New Castle county and Sussex separated from the province of Pennsylvania and formed their own government under the proprietor and a lieutenant governor representing the crown, adopting the style and name of "The Government of the Counties of New Castle, Kent, and Sussex upon Delaware."

In 1705, a State House was erected in New Castle, and it became the seat of The Government of the Counties of New Castle, Kent, and Sussex upon Delaware and continued as such through the American Revolution. The colonial assembly which met at New Castle consisted of representatives from each of the three counties. They met spasmodically, and enacted such laws under the proprietor and lieutenant governor as appeared to be required for their common welfare. The history of our state appears to be uneventful insofar as county and state government was concerned until the year 1776 when, The Government of the Counties of New Castle, Kent and Sussex upon Delaware, acting by and through its representatives in New Castle, sent delegates to the Continental Congress in Philadelphia. Following the recommendations of that Congress that, in anticipation of independence from the crown, each colony designate a form of government which would be free and independent from the governor and royal crown in the event of independence, The Government of the Counties of New Castle, Kent and Sussex upon Delaware adopted appropriate resolutions on June 15, 1776, which perpetuated in authority those persons then holding office in the colony to continue to exercise such powers as they then held until a new government could be formed, agreeable to the Continental Congress. Force, *American Archives*, 4th series Vol. 6, P. 884.

Following the Declaration of Independence on July 4, the representatives of The Government of The Counties of New Castle, Kent and Sussex upon Delaware, convened in New Castle and on September 20, 1776 formally adopted the first constitution of the State of Delaware.

Thus Delaware history teaches us that from its early beginnings of colonization and through the period of William Penn from 1680 to 1776 the three counties were united in a government that must be considered until independence as having been, with a brief interlude as a royal colony, a proprietory government of William Penn and his heirs.

Throughout its history, the counties, two of which were divided, by Penn served a governmental function but had no autonomous sovereignty as such. Each was equally represented in the General Assembly during the Act of Union and thereafter, and indeed there was good reason for equal representation. The population of Delaware in its early history was sparse and equally distributed in the three counties. On the eve of the revolution, the total population was approximately 37,000 and was fairly evenly divided among the three counties. Monroe, J. A., *Federalist Delaware, 1775-1815*, p. 15. Thus, under the Constitution of 1776 when a bicameral legislature was created called the General Assembly, each of the counties was equally represented in the upper house known as the Legislative Council, and the lower house known as the House of Assembly. From 1776 until February of 1779, Delaware was constitutionally an independent nation allied in war with Great Britain with 12 former colonies and, while the plan of union for the 13 colonies had been completed and submitted to the 13 states in the latter part of 1777, it was not until February of 1779 that Delaware ratified the union.

Its history does not reveal any specific instances in which the claim was made by the counties that they were sovereign. The three learned judges below, each steeped in Delaware history, found no county sovereignty existed. No authority of the Defendant's claims that true county sovereignty existed.[15] Through the subsequent constitu-

15. The witness, Leon DeValinger, equated county sovereignty with the fact that each county was represented in the Assembly at New Castle:

BY MR. HUGHES:

Q. Mr. DeValinger, what I meant to get at is you would not say that they were sovereign before the Declaration of Independence?

A. Well, when I said that they were I was thinking in terms that they were able to legislate in their own behalf, in their own Assembly at New Castle. I was thinking in that term. (Del. App. 21a)

tions of 1792 and 1831, representation in the legislature of the State remained equal. In 1852, however, when the first population shift in the State appeared, a Constitutional Convention was held which provided additional representation on population for the City of Wilmington. Because such representation was not adequate, a representative of the Wilmington area bolted the convention and later was successful in defeating the draft of the constitution which was presented to the people for approval. See: *Debates and Proceedings of the Constitutional Convention of the State of Delaware*, Dover, p. 1853. By 1897 it was no longer possible to continue a General Assembly that was wholly predicated upon factors other than population and in that year the present area representation in both the house of Representatives and the Senate was created. It is interesting to note that Delaware history repudiates the claim that Federal analogy is applicable to it as early as 1852. History shows that when population growth occurred in Delaware, there was a corresponding increase in the desire for representation in the General Assembly based upon population. Between 1852 and 1897 as the population increased, the pressures for increased representation on a per capita basis grew stronger and, finally in 1897, when the present constitution was adopted, the county sovereignty principle broke down completely and the convention adopted representation based upon geographical districts that had no relationship to counties, whose delegates in the General Assembly were selected from each district and not from the counties at large as had been done theretofore in Delaware.

The debates of the Convention of 1897 are voluminous and are bound in five volumes containing 3,513 pages of debates and reports. These debates constitute Delaware History and served as the basis for the historic facts contained in the Complaint and in the trial of this cause. The lessons of history which they teach is, that by 1897 whatever the prior history may have been, county sovereignty as such had ended in that convention.

Today, the counties exercise a number of governmental functions and rights that have been referred to in the opinion of the Court below (J. S. A. A39). It is illuminating we think to note that each of the powers exercised by the counties in Delaware today are powers that have been specifically granted to them by the Delaware State Legislature. The legislature or state having the power to give, of course, has the power to withdraw and thus, to speak of county sovereignty as a justification in 1963 for the gross inequality in representation which exists in the Delaware Legislature is to lean indeed on a most slim reed.

2. Reliance Upon the Supposed Analogy Between the Legislative Body of a State and the Congress of the United States Is Misplaced.

The historical concern which necessitated the compromise which resulted in Article 1 of the Federal Constitution does not provide a rational basis for the grossly disproportionate representation which exists in the Delaware General Assembly. Delaware is not a federated republic; it is a unitary state. Its counties take their power, duties, and indeed, their very existence by grant of the state. It is significant to note that the duties and powers ascribed to in the pre-trial order (Sincock App. P. 32a) are all the result of legislative grant by the General Assembly of the State.

In this regard, Delaware merely illustrates the universal rule concerning the limited authority possessed by the political sub-divisions and their dependence on the state legislature for power and their exercise of governmental powers. *Hunter v. City of Pittsburgh*, 207 U. S. 161.

Moreover, Delaware's bi-cameral legislature and its counties bear no counterparts historically, legally, politically, or philosophically in the federalist system of sovereign states.

The Fourteenth Amendment guarantees the equal protection of law to all persons. Article 1 of the Constitution

guarantees the exact opposite with regard to the apportionment of the United States Senate.[16] In examining the so-called federal analogy one must remember that the apportionment provided in Article 1 of the Federal Constitution can not in any way be limited by the application of the Fourteenth Amendment. The Fourteenth Amendment, however, permits, and indeed, sustains a challenge to the federal plan of apportionment where its apportionment would sanction as it would in Delaware discrimination based on no other policy.

It is respectfully suggested that the so-called analogy sought to be drawn from the composition of the General Assembly of the State of Delaware, to the composition of the United States Senate, is inapposite. For as this Court stated in *Gray v. Sanders*, 372 U. S. 369:

> "We think the analogies to the electoral college, to districting and redistricting, and to other phases of the problems of representation in state or federal legislatures or conventions are inapposite. The inclusion of the electoral college in the Constitution as the result of specific historical concerns, see footnote 8, *supra*, validated the collegiate principle despite its inherent numerical inequality, but implied nothing about the use of an analogous system by a state in a state wide election. No such specific accommodation of the latter was ever undertaken, and therefore no validation of its numerical inequality ensued."

There is nowhere to be found in the history of the state of Delaware any proceeding wherein the composition

16. See *Scholle v. Hare*, 360 Mich. 123; 104 N. W. 2d 63, reversed and remanded, 329 U. S. 429; "Article 1 * * * [of the federal constitution] guarantees *inequality* of the representative value of a man's vote so far as concerns a National senate, whereas the Fourteenth Amendment guarantees a *substantial approximation* of the *very opposite* within the frame work of the government of each state."

of the General Assembly of the state of Delaware was ever subjected to the necessities underlying the composition of the United States Congress. The principle of equal representation of the state combined with the populative representation of the House of Representatives was part of a historical compromise between sovereign states agreeing to form a federal union. It was not a compromise of what constitutes a fair apportionment. Such compromises frequently occur and the manner in which an apportionment is decided is largely irrelevant in determining whether or not it is arbitrary and therefore violates the Fourteenth Amendment. The compromise in the constitutional convention was over the nature of the new union. Those who favored a legislature made up of one house with each state represented equally—the same apportionment as in the Congress of the Confederation—uniformly believed that the new government should merely be a reconstruction of the old Confederation, although with additional power to meet the problems the Confederation had been unable to solve.

Thus, they saw the new government as a composition of sovereign states with powers in areas in which the individual states had been ineffective. On the other hand, the advocates of a legislative, whether made up of one or two houses apportioned entirely according to population invariably considered the proposed constitution as establishing an entire new government operating directly on the people with the states in a decidedly subordinate role. Ultimately, because the lack of agreement on the basic nature of government and the apportionment which depended on this question, threatened to prevent the adoption of a new constitution, the delegates compromised. They decided to establish a government which operated directly on the people but was composed of sovereign states. The House of Representatives was considered as representing the people, while the Senate represnted the states.

That the Federal analogy to the Delaware scheme of government is a false one is shown by the following additional facts:

1. The United States Congress is composed of two Houses, the Senate and the House of Representatives, the House of Representatives being apportioned according to the population. The guarantee of one representative to each state works out quite differently from the apportionment in the Delaware House of Representatives according to the amendment to Article II, Section 2 of the Constitution of 1897. The reasons being basically that there are not enough representative districts to allow true distribution in accordance with population, whereas, there is such a sufficient number of seats in the Congress. Of the 436 incumbents of the House, only 5 come from states which have less than 1/436 of the population.[17] In the Congress it takes representatives from states with almost 50% of the population to constitute a majority of the House of Representatives, but only 28% (prior to the amendment, but 18.5%) of the people elect a majority to the Delaware House of Representatives.

Additionally, apportionment to the Delaware House of Representatives and Senate is to districts, rather than to the county, whereas in the federal system apportionment is to the state as a whole when there is not sufficient population to justify a representative district on a population basis. The obvious conclusion from the above is that in Delaware neither of the two Houses is apportioned in whole or in principal part upon population.

17. Vermont, Wyoming, Nevada, Alaska, and Delaware.

E. In Delineating the Application of the Equal Protection Clause of the Fourteenth Amendment, Nothing Is to Be Gained by Turning the Clock Back to 1868 When the Amendment Was Adopted, But the Right to Equal Suffrage Must Be Considered in the Light of Its Full Development and Its Present Place in American Life Throughout the Nation.

The contention is made that contemporaneous congressional legislation purporting to "readmit" the former Confederate states establishes that state constitutions providing for senates apportioned on an area basis were never deemed to violate the Equal Protection Clause.

This contention finds its genesis in *Brown v. Board of Education*, 347 U. S. 483. There, this Court held that such a discussion relative to the application of the Fourteenth Amendment to segregated schools was at best inconclusive.[18] Mr. Chief Justice Warren speaking for the court said (489-490):

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18. As this Court has already noted in *United States v. States of Louisiana, etc.*, 363 U. S. 1, the extent of the examination of the various constitutions of the former confederate states by the reconstruction congress is uncertain. The strong possibility is that it is limited to the determination of whether or not the candidate state possessed a republican form of government and whether or not the constitution had been duly adopted. In that case, Mr. Justice Harlan stated:

> "Reliance is based on the act of March 21, 1867, 14 Stat. 428, providing for a state's readmission when, among other things, its 'constitution' shall have been admitted to congress for examination and approval and congress shall have approved the same * * *"
>
> "I find nothing in this provision or in those of any of the other so-called reconstruction legislatures act of March 23, 1867, 15 Stat. 2; Act of July 19, 1867, 15 Stat. 14; Act of March 11, 1868, 15 Stat. 41, which warrants the conclusion that the constitution of the readmitted states were to be 'approved' by congress except in the sense that congress must be satisfied that they had been duly adopted and were republican in form.
>
> "The following excerpts from the congressional debates are typical of many others: 'Now, sir, what is the particular question

"Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convinces us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinction among 'all persons born or naturalized in the United States', their opponents just as certainly, were antagonistic to both the letter and the spirit of the

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we are concerned? Five or six states have had submitted to them the question of forming constitutions for their own government. They have voluntarily formed such constitutions, under the direction of the government of the United States. They have sent those constitutions here * * * We have looked at them; we have pronounced them republic in form; and all we propose to inquire is that they shall remain so forever. Subject to this requirement, we are willing to admit them into the union'. Representative Stevens of Pennsylvania, Cong. Globe, 40th Cong. 2d Sess. 2465.

"'All previous fundamental conditions imposed upon a state being admitted into the union have been upon one of two grounds, either that the clause in the State constitution objected to was not violative of the constitution of the United States, or that it effected some great material rights without which the government would not be republic in form * * *.

"'When we go beyond securing the enforcement of the guarantee of republic government, which we have the power to do, when we undertake to legislate for them upon matters on which they have passed, we transcend our boundaries'. Senator Sherman, Cong. Globe, 40th Cong. 2d Sess. 2968, 2969." (P. 136 et seq.)

That the questions raised in the instant and related actions do not involve the concept of republican form of government (Article IV, Section 4, Constitution of the United States) has been held by this court in *Baker v. Carr*, 369 U. S. 186.

Amendments and wished them to have the most limited effect. What others in Congress and the State legislatures had in mind cannot be determined with any degree of certainty.

"An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time. In the South, the movement towards free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas. The school term was but three months a year in many states; and compulsory school attendance was virtually unknown. *As a consequence, it is not surprising that there should be little in the history of the Fourteenth Amendment relating of its intended effect on public education.*" (Emphasis added.)

The Court went on in *Brown, supra,* to state (p. 492):

"In approaching this problem we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its

full development and present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these Plaintiffs the equal protection of the laws."

Contrary to the claim of "firstness" asserted by counsel for the defendants (App. B. 71), the specific rationale, that the approval of the constitutions of the former Confederate States by the Reconstruction Congress indicated something about the applicability of the Fourteenth Amendment, was also suggested by Mr. Justice Frankfurter in his dissenting opinion in *Baker v. Carr*, 369 U. S. 186, 310. An element of the same contention also appears in *Maryland Committee for Fair Representation et al. v. Tawes*, 229 Md. 406, 184 A. 2d 714 (719).

Where a literal interpretation of a clause of the constitution cannot suffice (as normally it cannot), the courts usually turn to the constitutional convention debates, the comments of Jefferson, Madison's notes and the writings of other contemporaries, or the legislative history of an amendment. In some cases, where the official record is silent, a *post hoc* contemporaneous construction may develop. Perhaps the best illustration of such an interpretation is *Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 394 in which the Court accepted the so-called conspiracy theory of the Fourteenth Amendment and held that corporations were "persons" under the amendment. The legislative history of the amendment provides no such interpretation. See: James, *Framing of the Fourteenth Amendment* (1956 University of Illinois).

At its best, contemporaneous construction is a difficult process. Witness for example that a Congress contemporary to the period in which the Fourteenth Amendment was adopted enacted the Civil Rights Acts which a similarly contemporary court held unconstitutional. *The Civil Rights Cases*, 109 U. S. 3.

Furthermore, of all the parts of the constitution, with the possible exception of the commerce clause, the several clauses of the Fourteenth Amendment have been most elastic in conforming their interpretation to the time in which their use seems appropriate. Surely the concepts of due process and equal protection have changed since the *Slaughter House Cases*, 16 Wall. 36 (83 U. S. 394), decided on April 14, 1873, less than 5 years after the Fourteenth Amendment was adopted or *Plessy v. Ferguson*, 163 U. S. 537 decided in 1896.

Brown v. Board of Education, supra, is perhaps the best illustration of the hazards and general disutility of contemporaneous construction. There, as has been pointed out, the Court specifically directed additional argument on the historical meaning and development of the equal protection clause in the area of education. Evidence was submitted which purported to prove that Congress "could not have meant" the clause to require desegregation, since a contemporary Congress established a segregated school system for the District of Columbia, and because some of the ratifying states had segregated school systems. Virginia's school system, established by the reconstruction constitution provided a segregated school system, yet Congress not only accepted it, but demanded that it not be changed. Surely Appellants do not suggest that this contemporaneous construction of the Fourteenth Amendment may now be used to overrule the *Brown* decision. Nothing could better summarize the constitutional significance of the developing concept of equal protection of the laws than the Chief Justice's rejection of the argument built on contemporaneous construction. The Court there refused, as noted above, to turn the clock back to 1868 when the amendment was adopted.

Contemporaneous construction may be significant, but it is not controlling in a system which permits the law to grow with the times. As conditions change, as society matures, the law has also changed and matured.

Such evidence as does exist would strongly suggest that the purpose of the Fourteenth Amendment was basically to protect the rights of negroes. Thus, the Reconstruction Congress refused to "accept" the new constitutions of the confederate states until they ratified the amendment. The history and contemporary meaning of the amendment must be understood in that light. There was some substantial doubt about the legality of the "readmission" process itself. This doubt would seem well placed in light of *Texas v. White*, 7 Wall. 700, 19 L. ed. 227, which held that secession was a legal impossibility in the federal union. Ratification of the amendment, with its overriding concern for negro rights, was the overwhelming concern of the Reconstruction Congress. Ratification was politically possible only by predicating acceptance of southern congressional representation on southern ratification. Similarly, for reluctant southern leadership, ratification was the only road to the end of the hated reconstruction regime's grip on southern government. Coulter, *The South During Reconstruction*, 1867-77, Vol. VIII, in *A History of the South*, La. State U. Press, 1947, pp. 137-138.

Two assumptions can be made. One is that under the standards of equality of the time, given the specific circumstances of South Carolina, Georgia, and the other states with disparities of 6-1 mentioned by Appellants, Congress considered these extreme cases explicable, in that (a) majority rule was assured and (b) the spread of representatives was not otherwise invidiously discriminatory. More likely, however, they considered the apportionments, *if at all*, adequate or not as important under the disruptive conditions of the reconstruction, as the provisions for civil rights and suffrage and the practical necessity of getting the Fourteenth Amendment adopted, inasmuch as it was in severe difficulty, and likely of failure unless the Southern states were coerced to ratify it. Random disparities of 6-1 within 100 years of the establishment of the free government may well have seemed as fair there and then as

separate facilities and schools for the negro race. Separate facilities were an advance over no facilities. And without question, the constitutions of the period before and after the Civil War were advances in democracy over their antecedents. We deal in this case with a regression in equality, not an advance.

The reconstruction constitutions were uniformly more democratic than those they replaced. They extended suffrage to negroes and abandoned both race and property as bases of representation, replacing these restrictive provisions with the total population as the representative base. *Ibid.*, p. 135; Simpkins and Woody, *South Carolina During Reconstruction.* University of North Carolina Press, 1932, pp. 95-98. In this sense, the contemporary purpose of the amendment was fulfilled. At that time, the problem was not the apportionment formulae failing to conform with then existing notions of fairness or equity, but exclusion of negroes or the propertyless from the base on which representation was computed. It should also be remembered that during this period new state constitutions provided increasingly for a population basis for representation and universal manhood suffrage. For instance, the 1864 Constitution of Maryland provided a true population base for one house, and for the first time took some account of Baltimore's population. Of this period it has been written that if the post civil war period in American History can be called the Age of Insurgency, it may also be called the Age of Reaction of Direct Representation. DeGrazie, *Public and Republic*, 1951, p. 160.

In addition, the question of apportionment *as such* had not reached the proportions of a national problem by this time. In most states reasonable equality existed, and moreover, social differentiation had not reached the point accompanied by population concentration to make the problem acute beyond some of the oldest states.

Of the Southern states, only Georgia and South Carolina did not use population alone or substantially for the

basis of one legislative house. In *Toombs v. Fortson*, 205 F. Supp. 248 (D. C. Ga., 1962), a federal court, in reviewing the history of Georgia's apportionment, found the post bellum apportionment probably not unreasonable for the then existing population pattern. Speaking of the 1868 apportionment, the court said (255):

> ". . . when it made its appearance this formula was to some degree adjusted to population. History also demonstrates that tremendous shifts in population, have destroyed the 3-2-1 system as a population apportionment basis. The result is that what may have been a reasonable apportionment by population when the system was introduced, has through inaction, become an unreasonable system as relates to population."

Similarly, Senate apportionment in Georgia made, at the least a limited recognition of the most populous counties claim for more representation.

This leaves only South Carolina as the possible basis of the claim that the Congress and the ratifying states "couldn't have meant" the equal protection clause to apply to legislatures. It already has been established that the 1868 South Carolina constitution provided a more representative legislature than that which preceded it. There would seem, in light of the political history of the amendment and the overwhelming tendency to make legislatures more democratic during this period, just as much evidence that the framers and ratifiers "couldn't have meant to exclude" legislatures from application of the amendment "as that they couldn't have meant to include them." By the line of reasoning followed by Appellants, the rejection of the Amendment by malapportioned Delaware and Maryland, "could well have meant" they feared the consequences of equal protection for their legislatures. New Jersey and Ohio also attempted to withdraw their consent to the Amendment. Both states now have "federal plan"

apportionments. We suspect their actions are equally significant to those reported in Appellants' brief.

The enforcement section itself would lend more credence to this notion than to the necessity of exclusion. The penalty of reduction of seats in Congress was to result if a state discriminated against voters in the election of members of Congress, state officers and legislatures.[19]

The argument, to be frank, is pure conjecture. It is less good as conjecture, even, than the contemporaneous construction argument of *Brown v. Board of Education, supra*. There, at least, there was subsequent Congressional action on segregated schools. In a sense, the same thing is suggested here.

It is argued that by accepting the reconstruction constitutions, and in admitting to the union other states since 1868, the Congress established as policy, at the least, or an overt interpretation of the Fourteenth Amendment at the most, that the constitutions of the newly admitted states conformed to the provisions of the Fourteenth Amendment's Equal Protection Clause. Let us consider the proposition in decreasing levels of generality.

First, the basic duty of Congress in admitting a new state is to certify that it has a republican form of government. There is no precise legal or political definition of this term. Acceptance by Congress of a State Constitution is not a guarantee that every clause of the state's basic law conforms with the Supreme Law, the United States Constitution. If Congress had this power, it could, by chicanery, subvert the Constitution itself by accepting any error or idiocy which a state convention might adopt. Congress may require a constitution contain certain things, but it cannot guarantee the state safe passage through a challenge of its constitution against the Federal charter. The

19. Enforcement of the section has never been attempted, and has been held to constitute a political question. *Saunders v. Wilkins*, 152 F. 2d 235 (CCA 4, 1945); cert. den. 328 U. S. 870, reh. den. 329 U. S. 825, 329 U. S. 825 (1946). This is probably undisturbed by *Baker v. Carr*.

cases before the court, as Mr. Justice Brennan clearly said in *Baker*, arise under the Equal Protection Clause, not under the Guaranty clause.

Since 1868, states were admitted which maintained segregated school systems. Closer to the point here, Constitutions containing the grandfather clause for suffrage qualifications were approved. Congressional acceptance of the original constitution did not save it from later challenge under the Fourteenth Amendment or other provisions of state constitutions.

Next, if one turns to the "readmitted" states of the Confederacy, an even less substantial case appears. The argument is advanced that these states would not have been readmitted with legislatures which violated the amendment.

1. This ignores the history and original purpose of the amendment.

2. This ignores the fact that the constitutions of the "reconstructed" states were more democratic and the legislatures were more representative than ever before.

3. Finally, the argument assumes that the amendment was adopted *prior* to "readmission" of the confederate states, thereby providing a legal basis for rejection of constitutions for imperfect legislative apportionment articles.

The last assumption requires a bland innocence of constitutional history. Readmission of most of the confederate states was predicated upon their ratification of the Fourteenth Amendment. Nearly all were, by this process, readmitted before the amendment was law. The last state needed to ratify was South Carolina. Upon its ratification, which took place on July 7 and 8 of 1868, South Carolina was "readmitted" to the union. On July 9, the Secretary of State declared that a sufficient number of states had ratified. Proclamations to this effect were issued on July 24 and July 28. Thus, the state whose apportionment seems

the lone support for the far-fetched conjecture about contemporaneous construction was "back in" the union before a legal basis in fact existed to sustain a challenge of its apportionment. This leaves one possible loophole for the argument, to wit: no state would ratify as amendment which would disallow a provision of its constitution. There is no evidence to suggest so omniscent an attitude by the states in ratifying amendments. If this were true, we probably would never have adopted the Constitution itself, much less the Bill of Rights and the Fourteenth Amendment.

Finally, we have left once again the content of state constitutions accepted on admission since the Fourteenth Amendment. All states admitted since 1868 were first incorporated territories. It is perhaps significant that in all of them, Congress provided in their Organic Acts for apportionment of both houses based on population. This is the only evidence existing of a national policy on legislative representation. Frequently, the organic act incorporated or echoed Sec. 1849 of the Revised Statutes of 1878 (Title 23, Ch. I):

> "The apportionment of representation . . . shall be as nearly equal as practicable among the several districts and counties for such first election of the council and house of representatives, giving to each section of the territory representation in the ratio of its population, except Indians not taxed; and thereafter in such new territory, as well as in all territories now organized, the legislative assemblies, respectively, may re-adjust and apportion the representation to the two houses thereof among the several counties and districts, in such manner from time to time, as they deem just and proper; but the number of either house, as authorized by law, shall not be increased."

The significance of the section is the extent to which its basic proposition was echoed in the original apportionment provisions of states admitted since 1868. Only two

New Mexico and Montana, ignored population in one house, and the resultant disparities in the original state legislature were not egregiously discriminatory. Except for Alaska and Hawaii; both with exceptional geographic problems to consider, based both houses fully or substantially on population. It may be true that these original provisions have not been obeyed, or contained restrictions, such as Oklahoma's limit on total number of members from any county, which made them outmoded over time. The fact remains, however, that at the time of their admission, representation in the states joining the union since 1868 was reasonably related to population—certainly in every instance, more perfectly related than at present.

One final note. Appellants are critical of the Solicitor General concluding his analysis of the idea of equal representation in 1836. This is enough to establish, it seems to us, a basic point. The right of citizens to fair representation was established, well understood and widely acknowledged in state constitutions before the 14th Amendment was adopted. Appellants claim the Amendment created no new right to equality of representation. We respond that such was not necessary in any event, since the right pre-existed the Amendment. It was, and remains imbedded in the national conscience and the idea of government by the consent of the governed. The historical argument fails because it is not historical. It recognizes no antecedents, no context, and no evaluation. It is not history, but historicism.

If an inferred contemporaneous construction of equal protection yields anything, it provides more support to the idea of equality of persons in representation than to the assumption that it somehow condoned malapportionment.

F. The Discriminations in Per Capita Representation Present in the 1963 Amendment Are Haphazard, Crazy-Quilt, and Not Susceptible of Classification and Are Therefore Inconsistent With the Well-Settled Interpretations of the Equal Protection Clause.

1. The Appellees Agree With the General Principle That the Equal Protection Clause Does Not Strike Down Classifications That Have a Reasonable Basis But Deny the Existence in This Case of Reasonable Classifications.

Wholly apart from the propositions of the pronouncements of the scope and interpretation of the Equal Protection Clause, which appear in the Appellants' brief (pp. 88-91), none of which deal with the problem in the instant case, we disagree entirely with the application which the Appellants here seek to make of such principles. In enunciating our disagreement, we feel compelled first to correct certain errors of fact which appear in the argument advanced by the Appellants. The Appellants claim existence of a basic pattern of apportionment for the Delaware General Assembly effected by the 1897 Constitution as amended in 1963. They asserted the basic pattern is that of a federal system of a Senate in which each constituent of the political union is equally represented and a House of Representatives apportioned to population. Firstly, we deny the existence of any pattern of apportionment for the Delaware General Assembly. The apportionment provisions found in the Constitution are arbitrary, geographical selections consisting of 35 representative districts having no relation to size or population and 17 geographical senatorial districts which again had no relation to size of area or population. The pattern is that of a crazy-quilt having no rhyme or reason that is discernible. Merely because a formula can be articulated,

which explains the composition of the Delaware legislative body, does not mean that such articulation or that such formula is reasonable, rational, or permissible according to the Equal Protection Clause.

The second basic error appearing in the brief of the appellants is the argument that the Senate of the State of Delaware is in any way analogous to the Senate or to the Federal senate. The contention is made that according to the provisions of the 1963 amendment, "each county was assigned 7 senators." This is not so. Apportionment of state senators in Delaware, since 1897, has been to specific geographical senatorial districts where senators are elected from the district and not at-large from the county. Identically, the apportionment of representatives in the General Assembly of the State of Delaware has, since 1897, been to specific representative districts, and unlike the federal body which is designed to be highly representative on a population basis, the House of Representatives is so grossly disproportionate on a population basis that but 28% of the population of the State of Delaware select a majority of the members of the House of Representatives. Furthermore, we suggest that according to the 1963 amendment, some 7 representatives will now be apportioned to *districts* which lie within the City of Wilmington. Eighteen will be apportioned to representative *districts* which lie within New Castle County.

At an earlier point in this brief, we have demonstrated gross disparities in voting rights on a per capita basis which exist between inhabitants of the City of Wilmington, as between inhabitants of different representative districts in New Castle County, as between inhabitants of different representative districts in Kent County, as between inhabitants of the different representative districts in Sussex County, and among the inhabitants of the three counties. The disparities exist on a horizontal and vertical basis.

The 1963 amendment when applied to the Senate results in population disparities in New Castle County ranging from 4,177 to 64,820, or a ratio of more than 16 to 1. In Kent County, population disparities range from 7,077 to 46,063, or a ratio of approximately 6½ to 1, and in Sussex County, disparities of 9,580 to 38,000 or better than 4½ to 1.

We think it sufficient under this portion of the brief to reiterate that the District Court below, considering all of the per capita disparities in representation, could find no rational basis for the 1963 amendment. No justification was offered at the trial by the Defendants except for the reliance upon the so-called federal analogy, which was rejected. In the complete absence therefore of any such reasonable classification and justification for the existent disparities, the Court's opinion below must be sustained.

2. There Is No Reasonable Basis for Representation in the Delaware House of Representatives in the Apportionment Scheme Contained in the 1963 Amendment.

The 1963 Amendment to Article II, Section 2 insofar as it relates to the House of Representatives, retains the basic 35 geographical units of representation. It provides for the subdivision of only those larger districts which have a population in excess of 22,501 inhabitants as shown by the last official decennial census. The result of the Amendment insofar as it relates to the House is to leave Kent and Sussex Counties without change. In New Castle County all of the districts having a population under 22,501 remain as they were prior to the amendment. The retention of the smaller districts results in perpetual disparities which under the amendment amount to 7 to 1 in Kent County, 4 to 1 in Sussex County, and 12 to 1 in New Castle County. The apportionment scheme established in 1897 permitted 18.5% of the population to control the House

and 22% of the voters to elect a controlling majority in the Senate. After the 1963 Amendment, the apportionment scheme, which continued in its geographical form, permitted 28% of the population to elect a majority in the House and less than 22% to control the Senate. No justification was offered at the trial for the House provisions. None of the Plaintiffs' witnesses could offer justification for the disparities. None of them could find a rational basis for the differences between districts. Even Dr. James K. Pollock, expert witness produced on behalf of the Defendants, found the distribution of population per representative district illogical and irrational. The Court below was unanimous in their opinion that the Amendment was invalid insofar as it related to the House and no reason appears in Appellants' argument which would compel the overthrow of that unanimity. Furthermore, the Court's decision that the Lower House should be apportioned on strict per capita basis of one man—one vote, has the support of the overwhelming decisions in State and Federal courts since *Baker v. Carr* (see: page 30 of this brief).

3. No Reasonable Classification Under the Equal Protection Clause Is to Be Found in the 1963 Amendment Which Purportedly Reapportioned the Delaware Senate.

The argument presented under this heading of the Appellants' brief (pp. 95-98) consists largely of a rehash of untenable arguments which we have dealt with at earlier places in our brief.

As we understand the so-called other features of the 1963 amendment which relates to the reapportionment of the Senate which are discussed by the Appellants at this point, it is that the designation of floterial senators in Kent and Sussex Counties does not amount to gerrymandering, and that the reapportionment effected by the 1963 amendment, while not perfect, was the best that could be made by the Delaware legislature.

The Court below in the majority opinion found that the two additional senators allotted to Kent County, which had a population in 1960 of but 14.4% of the total population and 2 additional senators to Sussex County, with but 16.6% of the total population, which would give each county an equal status with that of New Castle County with 69% of the population and which received no additional senators constituted a hidden gerrymander (J. S. A. A49).

Judge Layton in the minority opinion agreed with the majority classification that such a result is "sheer gerrymandering" but held that, because in his view the federal analogy was applicable to Delaware, this would not result in an unconstitutionally created body "provided the membership of the lower House is elected on a strict population basis" (J. S. A. A66).

Because of the inseparability of the apportionment provisions in both the Constitution and the Amendment, it is, of course, not necessary to decide whether the act violates the constitution on this ground. Nevertheless, we believe that in the absence of some permissible classification, the Legislature cannot so favor the residents of those senatorial districts located in Kent and Sussex Counties. This Court should find that the inequalities in per capita representation in the Senate is so gross in relation to the objective as to deny equal protection to the Plaintiffs.

The Appellants refer to the population disparities in the several senatorial districts within each county and seek to excuse them on the basis that the legislature had to act hastily. In our opinion, the test of the rationality of a plan cannot depend upon whether a particular plan is or is not the best one that could have been devised. The plan itself must stand the traditional Fourteenth Amendment test of rationality and if, as in the instant case, the plan does not measure up to such tests, it must be held invalid.

The Appellants' reference to the collection of taxes per representative district during the decade of 1952 to 1961 is only a partial recital of the total picture. In the

decade, the State Tax Commission has collected a total of $239,000,000, of which in excess of 92% of the total has been collected in New Castle County, 3% in Kent County and 5% in Sussex County, and yet the County collecting and paying the 92% of the total taxes and containing 69% of the total population of the State finds itself outvoted in the Senate 2 to 1 by the down-state minorities. We do not advocate a government by the wise, the good, and the rich, as suggested in the Appellants' brief (B. M. 98), nor do we advocate the tyranny of the majority any more than we advance the tyranny of the minority. However, this Court cannot avoid, in at least one sense, the support of the political philosophy of one of the parties to this suit. The Appellants' political philosophy is based obviously on the belief of minority rule. Ours is based on the idea that the minority and the majority should be free to form and change; that the system ought not to be closed to any group of the people. We think that all citizens of Delaware should be represented so that the majority will be genuine and the minority will be able to bargain with equality for equal rights. This case is almost the reverse of *MacDougall v. Green*, 335 U. S. 281, where there was an attempt to assure minorities minimal protection in nominating officers since the concentrated masses had practical opportunity to assert their strength at the polls. In Delaware no such practical opportunity exists. The apportionment system forecloses it. Power is improperly diffused and one class is permitted to govern the State forever or to render the government immobile however widespread the demand may be for action. Under the apportionment, whether it be the Constitution of 1897 or the Amendment of 1963, the representatives and senators elected by the minority of the people have held the reins of government secure in their hand for over 66 years. They hold under control all appointments, revenue measures, school construction, highway construction, home rule for municipalities, zoning, election reforms, and a myriad of other incidents of political power.

We, like the Appellants, believe in minority rights, but do not all minorities have equal rights? How, under the equal protection clause, can one minority be singled out from all others and be given perpetual control of a vital part of our state government. This is not a right to power which can be termed a constitutional right; and if this Court reverses the District Court below, it will have given the down-state minority a birth right to the Delaware Senate, and it will issue an invitation to every legislature in America still in minority hands to deny the majority of the state's citizens of their right to participate equally in the government whose laws they must obey and whose composition they can never change.

II.

THE ENTRY OF THE PERMANENT INJUNCTION RESTRAINING THE HOLDING OF ANY ELECTION PERTAINING TO THE GENERAL ASSEMBLY UNDER ARTICLE II, SECTION 2 OF THE CONSTITUTION OF 1897 AS AMENDED WHICH HAD BEEN DECLARED TO BE IN VIOLATION OF THE FOURTEENTH AMENDMENT WAS NOT A GROSS ABUSE OF JUDICIAL POWER BUT WAS WITHIN THE SOUND DISCRETION OF THE TRIAL COURT.

A. The Injunction Entered by the District Court Was Proper Equitable Relief and Was Not an Abuse of Discretion.

In the decree of April 30, 1963, the Court declared Article II, Section 2 and the Amendment to be both unconstitutional. All that remained to be determined was the form of appropriate relief. It had previously denied the Plaintiffs' Motion for an Injunction restraining the Defendants from conducting the General Election of 1962 insofar as it related to the General Assembly on the ground that the record was then incomplete. After a full trial, how-

ever, the Court was able to determine the relief that it deemed to be appropriate. Under the circumstances existing at that date, April 30, 1963, it appeared appropriate to enter only a declaratory judgment in the hope and expectancy that by October 1, 1963, the General Assembly might adopt a plan of reapportionment under the guide lines appearing in the Court opinion of April 17, 1963. When it became apparent that the Governor of Delaware intended to proceed, in accordance with the advisory opinion of the Delaware Supreme Court, under the provisions of the 1963 amendment, it became obvious that the relief of declaratory judgment alone was no longer appropriate. Under these circumstances, the Court below granted the Plaintiffs' request for an injunction forbidding the Defendants, election officials, from conducting the next general election of 1964 according to the invalid apportionment. The effect of the injunction is to leave to the legislature the opportunity to provide an acceptible substitute for the invalid apportionment provisions by statute. In issuing the injunction (J. S. A. A69), the District Court below expressly reserved jurisdiction to itself to make such further orders as it may deem necessary and proper. This was with the additional hope and expectation that the legislature might take some appropriate action in the light of the Opinion.

The appellants charge, contrary to fact, that the District Court refused to give the General Assembly sufficient time to reapportion the State and that its issuance of an injunction prevented the Amendment of the Delaware Constitution according to the terms of that instrument, which constituted fundamental and vitiating error (App. B. 98-110).

Turning first to the propriety of the injunction, the appellants are overlooking a fundamental of equity which applies with particular reason in the apportionment field as in all areas where the public interest is involved. A Court of Equity cannot act in a vacuum, and having found viola-

tions should afford appropriate relief. Relief is, of course, granted through the formulation of a decree of the Court, and this in turn requires the exercise of discretion which in the public field has an extremely broad application. *Virginia Railroad Company v. System Federation No. 40*, 300 U. S. 545, 552. *Pennsylvania v. Williams*, 294 U. S. 176, 185; *Mercoid Corp. v. Mid-Continent Investment Co.*, 320 U. S. 661, 670.

There is no remaining doubt that Courts in apportionment cases have the power to grant appropriate affirmative relief in order to secure the Plaintiffs' constitutional rights. The formulation of an appropriate decree of necessity depends upon the circumstances of each case, and calls upon the Court to exercise a delicate balance.

In this case, the Court repeatedly attempted to be of help and assistance to the General Assembly by staying the proceedings in the hope and expectation that some appropriate action might be taken by the General Assembly, (Order granting Limited Stay, July 25, 1962, J. S. A. A1-A5); by making it plain that it had no desire to substiute its judgment for the collective wisdom of the General Assembly whose primary duty it was to apportion itself (Opinion Overruling Motion to Dismiss, August 7, 1962, J. S. A. A6-A8); and by reiterating that the questions which were of the gravest importance to the citizens of Delaware should be decided only upon a full record (Opinion Denying Preliminary Injunction and Further Stay, October 16, 1962, J. S. A. A8-A13). Finally, after holding the provisions of apportionment to be unconstitutional it granted the legislature an additional five months to October 1, 1963, to fulfill its duties by preparing and enacting into law a reapportionment statute acceptable under the law and the guide lines the Court had endeavored to lay down in its final Opinion (April 17, 1963, J. S. A. A16-A56).

The course pursued by the Court below in encouraging the State legislature to reapportion itself is one that has been uniformly followed in other federal and state courts.

A review of those cases show that the action of the District Court was a proper exercise of its jurisdiction rather than a gross abuse of judicial power.

The Court below first delayed deciding the issue of constitutionality of the apportionment in order to give the legislature time to act. 207 F. Supp. 205. This was consistent with *Lein v. Sathre*, 205 F. Supp. 536, 540 (D. N. D.); *Magraw v. Donovan*, 163 F. Supp. 184, 187-188 (D. Minn.); *Mikell v. Rousseau*, 183 A. 2d 817, 823 (Vt. Sup. Ct.); *Asbury Park Press, Inc. v. Woolley*, 33 N. J. 1, 161 A. 2d 705, 714-715; *In re Legislative Reapportionment*, 374 P. 2d 66, 71-72 (Colo. Sup. Ct.); *Butcher v. Trimarchi*, 28 Pa. Dist. & County Rep. 2d 537, 542.

The Delaware General Assembly ignored the opportunity granted by the District Court, and the District Court thereupon further delayed entering a final decree until the legislature should have time, five more months, to make a new apportionment satisfying the requirements of equal protection. This course was consistent with the following cases: *Sobel v. Adams*, 208 F. Supp. 316, 318 (S. D. Fla.); *Toombs v. Fortson*, 205 F. Supp. 248, 259, and unreported opinion, September 5, 1962, U. S. D. C. (N. D. Ga.); *Baker v. Carr*, 206 F. Supp. 341, 349, 350-351 (M. D. Tenn.); *Moss v. Burkhart*, 207 F. Supp. 885, 894, 898-899 (W. D. Okla.); *League of Nebraska Municipalities v. Marsh*, 209 F. Supp. 189, 195-196 (D. Neb.); *Mann v. Davis*, 213 F. Supp. 577, 585-586 (E. D. Va.), pending on appeal, No. 69, this Term; *Thigpen v. Meyers*, 211 F. Supp. 826, 832 (W. D. Wash.), pending on appeal, No. 381 this Term; *Maryland Committee for Fair Representation v. Tawes*, Circuit Court, Anne Arundel County, Maryland, decided May 24, 1962; *Harris v. Shanahan*, District Court, Shawnee County, Kansas, decided July 26, 1962; *Fortner v. Barnett*, No. 59,965, Chancery Court, First Judicial District, Hinds County, Mississippi.

In the instant case, the failure of the legislature to enact appropriate apportionment provisions coupled with

the Governor's proclamation in which he proceeded under the provisions found to be unconstitutional by the District Court, compelled the Court to take further action. Thus, the Court entered the injunction which restrained the Defendants from proceeding under the provisions of the amendment which had been found to be in derogation of the equal protection clause. In so doing, the Court did not enter a final measure, but as we have noted, reserved jurisdiction to itself to make such further orders as might be necessary and proper under the circumstances. We think the clear intent of such provisions is that if the legislature would enact appropriate legislation to provide for reapportionment, the injunction would be removed. We think it equally clear that in default of appropriate legislation, the Court has reserved unto itself the right to grant further relief, including a judicial reapportionment, which would be consistent with the course that has been taken in *Fortner v. Barnett*, 59,965, Chancery Court, First Judicial District, Hinds County; *Sims v. Frink*, 208 F. Supp. 431 (M. D. Ala.), pending on appeal, sub nom. *Reynolds v. Sims*, Nos. 23, 27, 41, this Term; *Moss v. Burkhart*, 207 F. Supp. 885, in unreported Opinion July 16, 1963 (W. D. Okla.).

Thus, the entry of the injunction follows the traditional relief that Courts of Equity grant in the exercise of their discretion.

B. There Is Nothing in the Record Below to Justify the Hysterical Harangue in the Appellants' Brief Which Charges the Members of the Court Below With Undue Pressure, Haste and Compulsion on the Appellants.

We now turn more fully to the unwarranted charge that the three distinguished judges of the Court below engaged in a continuous course of urgency, haste and pressure that is supposedly wholly at variance with the standards prescribed by this Court for litigation involving

a State of the Union (App. B. 98 et seq.). This baseless invention of wild imagination of the Appellants can not, of course, stand unchallenged as regretable as the need for such rebuttal appears.

This action was brought under the provisions of Title 28 U. S. C. Section 2284 as an action required by an Act of Congress to be heard and determined by a district court of three judges. In paragraph 4 of Section 2284, it is provided:

> "In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application."

The complaint in this case was filed on June 5, 1962. It attacked the validity of the provisions of the constitution which related to the apportionment in both houses of the General Assembly of the State of Delaware. In November, 1962, the entire membership of the House of Representatives was to be elected and one-half of the Senate. The primary election which preceded the general election was schduled to be held on August 18, 1962, making it necessary to take certain preliminary steps by Saturday, August 4, 1962.

Shortly after the suit was instituted a bi-partisian committee was appointed by the Governor to recommend a plan of reapportionment of the General Assembly and a plan to convene a constitutional convention. On July 27, 1962, that committee recommended a constitutional amendment to Article II, Section 2 by act of the General Assembly passed in time to comply with the publication provision of the constitution followed immediately by the enactment of legislation which would accelerate the date on which a constitutional convention might be held to the middle of 1963. The report of the committee and the proposed legis-

lation were the foundation for the plea of the Defendants for a stay in these proceedings.

On July 25, 1962, the Court, having heard various Motions to Stay and to Dismiss, noted that if the General Assembly was to accomplish the amendment and the constitutional convention it would have to act prior to August 4, 1962. In its opinion the Court referred to these matters and while not expressing an opinion regarding the validity of the proposed legislation, commented that in the light of *Baker v. Carr*, 369 U. S. 186 there was a possibility that the proposed legislation might contravene the Fourteenth Amendment. Under such circumstances the Court, in an endeavor, again, to be helpful to the legislature, suggested that as a "temporary harbor" and not as a "permanent haven" the General Assembly might provide that reapportionment be by statute. In such spirit it granted a stay in the proceedings until August 7, 1962 in the hope and expectation that some appropriate action might be taken by the General Assembly.

This is precisely the same suggestion which was given by the Maryland Court of Errors and Appeals in the *Maryland Committee For Fair Representation, et al. v. Tawes*, 228 Md. 412, 180 A. 2d 656 (1962) p. 670.

On August 2 the Court conducted an argument on certain Motions To Dismiss and To Further Stay The Proceedings. On August 7 it handed down an opinion overruling the motions and stated:

> "We wish to make it plain that we have no desire to substitute our judgment for the collective wisdom of the General Assembly of Delaware whose primary duty it is to assure the electors of this state apportionment provisions to meet the tests laid down by the Supreme Court of the United States in Baker v. Carr, but in the light of all the circumstances we have no alternative but to proceed promptly." (J. S. A. A8)

By August 7, 1962 it was apparent that the efforts of the Court to be of help to the General Assembly had been ignored and that the General Assembly intended to reapportion by amendment to Article II, Section 2.

The record shows that on August 7, 1962 the defendants filed a Motion For a Further Stay in the proceedings and that on the following day the plaintiffs filed a Motion for a Preliminary Injunction to enjoin the defendants from conducting the general election scheduled for November 6, 1962 insofar as it pertains to the election of members of the General Assembly, and for trial. A brief schedule was fixed by order on both motions and oral argument set for August 29, 1962. This order was further extended to provide for argument on the Motion For Preliminary Injunction on September 17, 1962. Numerous affidavits and briefs were filed on behalf of all parties. Argument was held on September 17, 1962 and both sides filed Proposed Findings of Fact and Conclusions of Law on the Motions for Preliminary Injunction and For a Further Stay. On October 16, 1962 the Court denied both motions.

In denying the Motion For Preliminary Injunction, the Court stated that:

> "The suit at bar was filed on June 5, 1962 and has been proceeded with with a celerity consonant with the importance and intricacy of the issues involved. We cannot find on this record that the plaintiffs and others situated like unto them will suffer irreparable damage if we do not enjoin the election of November 6, 1962 insofar as it relates to the election of members of the General Assembly. On the contrary, if we enjoin the election of November 6, 1962, we will have to substitute, in lieu of the provisions of Section 2 of Article II, an apportionment plan, election laws or rules and regulation devised by ourselves. Though the plaintiffs have suggested a plan for equalization of franchise the subject is one which requires careful study, further devel-

opment by expert witnesses and the opportunity for extensive cross-examination by the parties and exploration by the court. A different and new apportionment system perhaps cannot be devised as quickly and as simply as the plaintiffs assert. If we were to enjoin the forthcoming election of November 6 for members of the General Assembly to be held under present constitutional provisions without substituting therefor an adequate redistricting plan and clear and sufficient instructions to the defendants in the instant case it would have a most disastrous effect and might deprive large numbers of electors of the State of Delaware of their franchise on November 6 to elect members of the General Assembly. This we will not do. On this ground alone, if there were no other, we would deny the application for a preliminary, or interlocutory, injunction." (J. S. A. A14-A15)

This comment of the Court is consistent with the repeated statements of Judge Biggs to the effect that this was the most important case that he had sat in during his more than twenty-five years on the federal bench. It is ironical that in such a case we find that the words of caution and advice of an outstanding jurist are twisted and construed in the context in which we find them in the Appellants' brief.

On November 13, the parties met with the three judge Court after having prepared an extensive pre-trial order. This was most carefully examined by the Court which, after conferring with counsel on November 21 set the case for trial two months later on January 21, 1963.

This five day trial resulted in the opinion on the merits of April 17, 1963, where once again, instead of the supposed haste and pressure asserted by this Court on the General Assembly, the Court reiterated its reluctance to assume the task of reapportionment and restated its desire that time be given to the Legislature to accept its responsibility (J. S. A. A50).

"But a further opportunity must be given to the General Assembly of Delaware to work out the problem of reapportionment. We acknowledge the difficult problem faced by the General Assembly of Delaware in attempting to frame a reapportionment statute that will meet the guarantee of the Equal Protection Clause of the Fourteenth Amendment. Therefore, we believe it to be within the permissive bounds of propriety for a Court laboring in this field to state what it considers to be the minimal constitutional requirements under Baker v. Carr and the adjudications which have grown out of it." (J. S. A. A51)

After laying down guide lines for the General Assembly, a course requested of the Court below by counsel for the Defendants below, the Court reiterated

"We say again as we have stated in this opinion and other opinions in this case and during the course of the trial, that the primary duty of apportionment must rest with the General Assembly. This Court should not be compelled to embark upon the task of reapportionment because of legislative reluctance. The good of the state requires careful, even prayerful, study of all relevant factors and circumstances in the consideration of whole state interest, and a well-devised, reasonable and fair plan of apportionment. * * * (J. S. A. A54). We state again that this Court has not the slightest desire to deprive the citizens or the General Assembly of this State of their rights, nor have we any desire to assume their responsibility.

IV

"The State of Delaware, the General Assembly and this Court all seem to be trapped in a kind of box of time. The exigencies of the calendar and the oncoming general election of 1964 confront us. We will allow a reasonable period for the General Assembly to proceed to try its hand again at the problem of reapportionment.

"* * * We, of course, will allow the General Assembly a reasonable time in which to fulfill its duties. Accordingly, we will allocate to the General Assembly a period of time from the date of the entry of our final decree[20] up to and including October 1, 1963, to prepare and enact into law a reapportionment statute acceptable under the law and the guide lines we have endeavored to lay down herein."

October 1, 1963 passed without any reapportionment. It is now the end of November, 1963. The General Assembly of the State of Delaware has been in session almost continuously for the entire year of 1963 and yet nothing tangible has resulted in the field of reapportionment. This is consistent with the futile efforts that have been made prior to the institution of this suit to effect reapportionment. In the six years prior to suit, the General Assembly of Delaware received seven bills having reapportionment as their objectives. With one exception, all failed to come out of Committee. The exception was soundly defeated (Sincock App. 18A).

The Delaware General Assembly simply will not reapportion itself and it is unrealistic to expect it to do so. Moreover, there being no initiative or referendum in Delaware, the people are without relief, absent this Court's help. It is a mockery to plead here that the District Court below had refused to give the Delaware General Assembly sufficient time to reapportion itself. The history of the inactivity of the General Assembly itself makes such statements an invention of Appellants' counsel's wildest imagination.

Finally we suggest to the Court that the rights of the Plaintiffs in this case are of a character similar to the rights asserted in *Watson v. City of Memphis*, 373 U. S. 526, where the Court stated:

"The rights here asserted, are, like all such rights, *present* rights; they are not merely hopes to some

20. The final decree was entered on April 30, 1963.

future enjoyment of some formalistic constitutional promise. The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled." (Original emphasis.)

We see a sharp contrast in the rights asserted here and in the *Watson* case, *supra*, to the rights to enforce a money judgment against a sister state asserted in *Virginia v. West Virginia*, 241 U. S. 531.

We have shown here that the Court below is required under the provisions of Title 28, U. S. C., Section 2284 to give precedence to the application of the Plaintiffs who sought to enjoy the present rights denied them, and was required by such section to assign this cause for a hearing at the earliest practicable day. The record shows the constant concern of the Court that reapportionment remain the responsibility of the Legislature and that it afforded the legislature every conceivable opportunity to effect a proper plan. It is clear that it was the refusal of the General Assembly to accept its responsibility rather than supposed haste of the Court that has provoked the present difficulties which continue to deny the Plaintiffs their present rights under the Equal Protection Clause.

The record therefore does not substantiate the charge of compulsion, haste and urgency, and we suggest that the eminent counsel who prepared the Appellants' Brief, not having participated in the trial below, and not having had the advantage of observing the demeanor of the Court or the pace of the proceedings, has misjudged a few excerpts from the record and is far from the mark of actuality.

C. Neither the Decree Nor the Injunction Below Prevent the General Assembly of the State of Delaware From Enacting Appropriate Apportionment Provisions Which Would Meet the Tests of the Equal Protection Clause.

As we have shown, the final decree of April 30, 1963 declared both the constitutional provision and the amendment to be invalid under the Fourteenth Amendment. The Court reserved: "jurisdiction to itself to make such further orders as it may deem necessary and proper, * * *" (J. S. A. A68). Thereafter, under the reservation of jurisdiction, the Court below issued its injunction of May 20, 1963 restraining the defendants from conducting any election which pertained to the General Assembly under the apportionment provisions of the constitution of 1897, and the amendment thereto. The Appellants claim that the combination of the decree and injunction prevent an amendment to the Delaware Constitution in accordance with its terms and therefore constitutes a gross abuse of judicial power (App. B 104 et seq.).

We have previously shown that the combination of a declaratory judgment followed by an injunction is a form of relief that is well known in equity and in particular in the apportionment field, and that the District Court had a broad discretion under the circumstances we have noted. This is clearly not an abuse of judicial power.

Moreover it is within the express power of the General Assembly of the State of Delaware to place itself and all future General Assemblies of the state in a position where the Constitution of 1897 may be amended. If there is a paralysis extent in the General Assembly today it is not the result of a decree and injunction but is instead a self-inflicted paralysis which the Delaware General Assembly can remove if it so desires.

The Court below suggested the reapportionment as a temporary haven could be constitutionally accomplished by

means of a statute. Thus the first step that we suggest in the removal of any self-imposed paralysis would be the adoption of statutory apportionment provisions which would meet the tests of the Fourteenth Amendment.

If however the General Assembly in its collective judgment, is of the opinion that apportionment provisions belong in the constitution of the state rather than in a statute two additional courses are open to it.

It may incorporate in the form of an amendment to Article II, Section 2 the statutory provisions of apportionment of the General Assembly. It may then enact, as the first leg of amendatory proceedings, those statutory provisions into a constitutional amendment. After the general election of 1964, made possible by the enactment of statutory apportionment provisions, the next General Assembly may adopt the amendment as a constitutional enactment and the statutory provisions will become a part of the constitution.

However, if the present legislature wishes to proceed by way of a constitutional convention, it may propose along with the statutory apportionment provisions an amendment to Article XVI of the Constitution of 1897 which would provide for a constitutional convention to be composed of the delegates who shall be elected in accordance with the proposed amendatory provisions of Article II, Section 2.

If this is done by the present legislature and approved by the next General Assembly following the general elections of 1964, Article XVI providing for delegates for a convention will be coordinated with the amendment to Article II, Section 2 providing for the apportionment of the General Assembly thus clearing the way for a constitutional convention in accordance with the reapportioned provisions of the constitution.

Thus the combination of the decree and injunction below, is not only a form of relief which is proper in such cases as this, but their combined effect in no way precludes

the General Assembly from amending the Constitution of 1897 to provide for either the apportionment of the General Assembly or for the convening of a Constitutional Convention.

D. The Record Shows No Compulsion of the District Court to Apportion the Delaware General Assembly by Decree—to the Contrary It Shows the Court's Reluctance to Accept Such Burden—Until Requested by the Defendants to Establish Guide Lines.

There is no substance to the ad hominem contention made by the Defendants that the Court below desired to affect reapportionment of the Delaware General Assembly by judicial decree. Throughout the proceedings the Court in the "hope and expectation" that some appropriate action might be taken by the General Assembly, proceeded with extreme caution towards the defendants (J. S. A. A5, A8, A13). The Court recognized that it was the primary duty of the General Assembly to enact appropriate apportionment provisions in accordance with the test of *Baker v. Carr* (J. S. A. A8). It stayed the proceedings to permit the General Assembly to take such action as it deemed appropriate by way of amendment and refused to enjoin the election of November 6, 1962, as requested by the plaintiffs.

Even as late as April 17, 1963 it reiterated what had been stated in the prior opinions and during the course of trial that "the primary duty of apportionment must rest with the General Assembly. This Court should not be compelled to embark upon the task of reapportionment because of legislative reluctance." To provide such an opportunity the Court in order to permit the General Assembly to try its hand again at the problem of reapportionment allocated to the General Assembly a period of time from the date of the entry of its final decision of April 30, 1963 to October 1, 1963 to prepare and enact into law a reapportionment statute acceptable under the law and the guide lines the

court endeavored to lay down in its opinion (J. S. A. A54-A56).

Thus the Court extended an additional five months to the Delaware legislature to proceed in good faith to reapportion itself. The Appellants complain that the General Assembly was not given more time for deliberation. They do not refer to the fact that the final decree was handed down approximately ten months after the suit was filed or that the Court extended an additional five months for the reapportionment to be affected by the General Assembly. They now state, however, "that a more perfect apportion could easily be formulated" and that once this Court has established guide lines there is nothing to indicate that the Delaware General Assembly would be "unable" to effect a reapportionment consistent with the constitution of the United States (App. B pp. 108-109). One wonders why a plan so easily formulated with proper guide lines has not been enacted prior to this date by the Delaware General Assembly.

The thrust of the appellants' argument in large measure constitutes a vicious and unwarranted attack upon the judges who sat below. Statements that, at the very outset of the litigation, the District Court undertook to advise the General Assembly how it should amend the constitution and then publicly regretted that its gratuitous advise had not been followed; the comment which related to reapportionment plan suggested by the Court and the plaintiffs are all designed to leave the inference with this Court that in some improper manner the Court below was seeking to inject into the proceedings a matter that was not properly an issue. Nothing could be farther from the actual fact.

A review of the pre-trial order will show that the defendants agreed with the plaintiffs that one of the issues of law and fact which remained to be litigated was "What plan of reapportionment, if any, should be adopted?" (P. T. O. para. 13, Facts D-E, p. 29). At the pre-trial conference, the plaintiffs advised the defendants and the Court that it ex-

pected to present a plan for reapportionment. Rather than being invited by the Court to present such a plan, the plaintiffs announced well in advance of trial that they intended to produce the same.

Furthermore, the record is also replete with comment and colloquy showing that all of the parties knew that a plan would be presented by the plaintiffs and that the Court would be requested to lay down guide lines which it considered to be appropriate. A portion of such colloquy appears in the record as follows:

"Frank O'Donnell, Esquire, attorney for the Department of Elections for New Castle County and the Clerk of Peace for New Castle County:

"Judge Biggs: Let me ask you one question in connection with your objection. Assume this Court should find that the new amendment is unconstitutional in the light of the 14th Amendment of the United States Constitution, what then would you conceive it would be the duty of the Court to do?

"Mr. O'Donnell: I would now be stating my views, I have not consulted——

"Judge Biggs: Give us your views.

"Mr. O'Donnell: *My views are that if the Court should find that to be unconstitutional, that the Court should issue a mandate requiring the State to be redistricted in accordance with certain criteria, the lines to be adopted by the Legislature.* I think the Court might properly in its order give a reasonable time for compliance with the Court's order. If the Court finds that the order is not complied with, then more drastic measures might be in order, but that is the basis of our objection, that this question is not before the Court.

"Mr. O'Donnell: Yes. That is my idea of what we were referring to in Paragraph 13. I did not think and I still do not think that the fine lines of how the districts

should be drawn is the function of the Court. *I feel that and I thought then that you were ultimately giving a decision where you would give us the general guides that you thought were appropriate* and not the fine lines on the map of where the districts should be.

"Consequently we have not and did not prepare any testimony in opposition to the lines as laid down this afternoon. (Emphasis supplied; Sincock App. 73a, 74a)

"Januar D. Bove, Jr., former Attorney General, attorney for the State Election Commissioner, and the Department of Elections for Sussex County:

"Mr. Bove: May it please the Court, your Honors will recall that at the pre-trial conference counsel for the defendants did raise the question of the Court's proceeding by analogy to a patent case where the Court finds either infringement or validity or both and then goes into a hearing on damages. *We had suggested that if the Court found either Article 2 of Section 2 or House Bill 574 and also House Bill 3 unconstitutional in any respect, that the Court establish some guide lines on apportionment and then hold a hearing on the form of relief to which the plaintiffs would be entitled if the Court found unconstitutionality.* The Court did at the pre-trial reject that suggestion.

"During the course of these proceedings, if your Honors will recall, I renewed our application in that respect and your Honors reserved decision on it, as I understood it. Do I now understand that your Honors are denying that application?

"Judge Biggs: No. That was an oral application, was it not?

"Mr. Bove: Yes, sir.

"Judge Biggs: Mr. Bove, I would think it would be desirable, since the record has not yet been written,

and at least I am not entirely clear as to what your motion was, if you presented it now or presented it during the course of the next 48 hours by way of a written motion.

"Mr. Bove: Yes, your Honor." (Emphasis supplied; Sincock App. 75a)

The Court's opinion which established the guide lines was the result not only of the request of the Defendants' counsel but was also requested by the Plaintiffs as will appear from the following:

"Mr. Theisen: * * *. It certainly was my understanding, if your Honors please, that a pre-trial order was agreed to in these proceedings. It was my understanding before I went to the expense and time and work involved in presenting a plan for reapportionment that that matter was four-squarely before this Court and was known by the defendants all the time to be before this Court. We have brought experts here and we have litigated that question. They have brought experts here and they have litigated that question, and to state at this late hour that they did not realize that lines were to be drawn, when as long ago as last Tuesday we presented our plan with the lines drawn which we had told them we would present and told the Court in advance we would present, to state at this late hour that they are not now prepared is something quite frankly, your Honor, which shocks me, and I cannot let this occasion go by without stating my surprise." (Tr. 745)

And so instead of indicating any judicial compulsion to reapportion by decree, the record proves the contrary to be true. It establishes the recognition of the Court that it is the primary duty of the Legislature to apportion itself, and affirms the reluctance of the Court to assume such a burden. It also shows that, although the question of what

kind of a plan of reapportionment should be adopted, if any, was raised by the Plaintiffs, and the Plaintiffs in fact presented a plan, the Court did not effectuate any plan. To the contrary, the Court below, at the request of Appellants' counsel laid down "criteria, the laws to be adopted by the legislature; the general guides" which it thought appropriate for Legislature consideration.

CONCLUSION.

For the foregoing reaso., the Judgment below should be affirmed.

Respectfully submitted,

VINCENT A. THEISEN,
Counsel for Appellees.

Dated: November 29, 1963.

Proof of Service.

I, VINCENT A. THEISEN, the Attorney for the Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 29th day of November, 1963, I served copies of the foregoing Brief of the Appellees and the Appendix thereto upon the Appellants by delivering two copies of the same upon Frederick Bernays Wiener, at his suite, 815 Stoneleigh Court, 1025 Connecticut Avenue, N. W., Washington, D. C. and by mailing three copies thereof, in a duly addressed envelope, with first class postage prepaid, to Januar D. Bove, Jr., Beneficial Building, Wilmington, Delaware, and by mailing a copy of said Brief and Appendix in a duly addressed envelope, with first class postage prepaid, to the Honorable David P. Buckson, 225 South State Street, Dover, Delaware, to Honorable E. Norman Veasey, Public Building, Wilmington, Delaware, to James H. Hughes, III, 325 South State Street, Dover, Delaware, to Frank O'Donnell, 350 Delaware Trust Building, Wilmington, Delaware, and to N. Maxson Terry, 48 The Green, Dover, Delaware.

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Attorney for Appellees.

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IN THE

Supreme Court of the United States

October Term, 1963.

No. 307.

MABEL V. ROMAN, Clerk of the Peace for New Castle County; WALTER A. HANDSBERRY, Clerk of the Peace for Kent County; I. ROBERT WILLEY, Clerk of the Peace for Sussex County; et als.,

Appellants,

v.

RICHARD SINCOCK, et als.

On Appeal From the United States District Court for the District of Delaware.

RECORD APPENDIX TO BRIEF FOR THE APPELLEES.

(Cited as "Sincock App.")

VINCENT A. THEISEN,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 307

MABEL V. ROMAN, CLERK OF THE PEACE FOR NEW CASTLE COUNTY; WALTER A. HANSBERRY, CLERK OF THE PEACE FOR KENT COUNTY; I. ROBERT WILLEY, CLERK OF THE PEACE FOR SUSSEX COUNTY; ET ALS., APPELLANTS,

v.

RICHARD SINCOCK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

RECORD APPENDIX TO BRIEF FOR THE APPELLEES.

(Cited as "Sincock App.")

1. PRE-TRIAL ORDER, JANUARY 7, 1963.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE.

CIVIL ACTION No. 2470.

RICHARD SINCOCK, ET AL.,
Plaintiffs,

v.

WILLIAM DUFFY, JR., ET AL.,
Defendants.

The following is a pretrial order submitted by the plaintiffs' attorneys in accordance with the provisions of Rule 11 of the Civil Rules of the United States District Court of Delaware adopted pursuant to Rule 83 of the Federal Rules of Civil Procedure.

A. THE NATURE OF THE ACTION.

1. The suit at bar is a class action brought by the plaintiffs on their own behalf and on behalf of all other persons similarly situated. The plaintiffs assert that they are residents of four representative districts and four senatorial districts of the State of Delaware and are duly qualified voters and taxpayers of the State and citizens of the United States. The defendants comprise the Boards of Canvass, the Clerks of Peace, the Departments of Election and their Secretaries, of New Castle, Kent and Sussex Counties, respectively, and the State Election Commis-

sioner, all of whom perform statutory and constitutional duties relating to the general elections in the State of Delaware.

2. The plaintiffs contend that the provisions of Section 2 of Article 2 of the Constitution of Delaware of 1897, which provides for the apportionment of the State of Delaware into thirty-five representative districts and seventeen senatorial districts and for equal representation in the General Assembly for each district, denies to the plaintiffs the right of equal suffrage pursuant to Article 1, Section 3 of the Constitution of Delaware of 1897, and also denies to them equal protection of law under the Fourteenth Amendment of the Constitution of the United States of America. The plaintiffs further contend that the provisions of Article 2, Section 2 violate several Federal Civil Rights Acts because it denies them of the rights, privileges and immunities guaranteed by the Constitution of the United States. The plaintiffs also contend that the apportionment of the members of the General Assembly of Delaware by geographical units as provided in Section 2, Article 2 of the Constitution of the State of Delaware of 1897, debases and dilutes their voting rights, and ask the Court to declare the same to be unconstitutional and invalid for each reason. The plaintiffs further ask this Court to enjoin defendants from conducting, canvassing or otherwise engaging in any general election for the election of members of the House of Representatives or of the Senate pursuant to the provisions of Section 2, Article 2 of the Constitution of Delaware of 1897 or in the alternative to enter an order directing the conduct of the general election of November 6, 1962 to be held on an at-large basis. This Court in accordance with its opinion of September 14, 1962 refused to enjoin the election as requested by the plaintiffs. The plaintiffs further have asked this Court to enter an order reapportioning the representation of the House of Representatives and the Senate

in accordance with the population of the State and in accordance with Section 3, Article 1 of the Constitution of the State of Delaware to provide for free and equal elections and to provide such other relief as might be appropriate.

3. The defendants have filed answers but, in replying to many vital allegations of the complaint, have asserted that they do not possess sufficient knowledge or information as to many of the vital allegations. Some of the defendants admit the accuracy of the allegations as to population figures set out in paragraphs 21 to 25 inclusive of the complaint, which are supported by the exhibits attached to the complaint and those admitted into evidence. Some of the defendants contend that the present election districts are justified by historical, economic, geographic and topographic factors. The Chancellor of Delaware and the Judges of the Superior Court of the State of Delaware, all members of the Boards of Canvass, state in their answers that as judicial officers serving in ministerial capacities they deem it inappropriate to take a position on the merits of this lawsuit, but aver that as Chancellor of Delaware or as Judges of the Superior Court they will continue to discharge the duties imposed upon them by the Constitution of the State of Delaware unless restrained by a lawful order of this Court.

4. On July 25, 1962 the Court stayed the proceedings until August 7, 1962 in order to permit the 121st General Assembly to take such action as it deemed appropriate by way of amendment to Section 2, Article 2 of the Constitution of Delaware of 1897. On July 30, 1962 the General Assembly enacted a proposed amendment to the Constitution of Delaware, now embodied in H. B. 574, which, if agreed to by the 122nd General Assembly, would amend Section 2 of Article 2 of the Constitution to provide a new

composition of the House and Senate of the General Assembly. Publication of the proposed amendment has been made in accordance with Section 1, Article XVI of the Constitution.

5. On August 7th the defendants moved for a further stay, and on August 8th the plaintiffs moved for a preliminary injunction.

6. On October 8th the plaintiffs amended the prayers of their complaint to ask the Court provisionally to reapportion the House of Representatives and the Senate, and to declare H. B. 574 to be unconstitutional for the same reasons as asserted for the invalidation of Section 2 of Article 2 of the Constitution of the State of Delaware. On October 14, 1962 this Court denied both motions and set the matter down for a pretrial hearing on November 13, 1962 announcing that a time will be set for trial on the merits as soon thereafter as may be feasible after consultation with counsel.

7. The matter, therefore, comes before this Court on the complaint and amended complaint of the plaintiffs, and the answers of the defendants. By agreement of counsel The Honorable William Duffy, President Judge of the Superior Court, has been substituted for The Honorable Charles L. Terry, former President Judge of the Superior Court, and The Honorable George R. Wright, Associate Judge of the Superior Court, has been added as a defendant.

B. The Constitutional or Statutory Basis of Federal Jurisdiction.

1. This suit was brought under 28 USCA 1343 (62 stat. 932, as amended); which provides that district courts shall have original jurisdiction of any civil action authorized by law, to be commenced by any person to redress the deprivation, under color of any state or statutes of any

right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens, and to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. It was further brought under 42 USCA 1983 (17 stat. 13 as amended) which provides redress to every person who, under color of any statute of any state is deprived of the rights, privileges or immunities secured by the Constitution. The composition of the Court is that which is established by the provisions of Title 28, USCA, et seq. (62 stat. 968) providing for the establishment of a district court of three judges in all cases in which an injunction is sought to restrain the enforcement or operation of any state statute alleged to be unconstitutional.

2. The suit seeks a declaratory judgment under Title 28, USCA 2201 (Title 28, USCA 1940, as amended), as well as an interlocutory injunction and a permanent injunction invalidating the provisions of Article 2, Section 2 of the Constitution of the State of Delaware of 1897, and the provisions of H. B. 574 in so far as they relate to the election of the members of the House of Representatives and the Senate of the General Assembly of the State of Delaware and, in the case of H. B. 574, in so far as it relates to the composition of future constitutional conventions. The validity of Section 2, Article 2 and of the provisions of H. B. 574 is presently before this Court. Cf. Sims v. Frank, 205 F. Supp. 245 (D. C. Ala. 1962). (See Opinion of this Court dated October 14, 1962.)

C. Statements of Facts Which Are Admitted and Require No Proof.

1. The plaintiffs are residents of four representative districts and four Senatorial districts of the State of Delaware and are duly qualified voters and taxpayers of the State of Delaware and citizens of the United States.

2. The defendants comprise the Boards of Canvass, the Clerks of Peace, The Departments of Election and their Secretaries of New Castle County, Kent and Sussex Counties, respectively and the State Election Commissioner, all of whom perform statutory and constitutional duties relating to the general election in the State of Delaware.

3. The legislative power of the State of Delaware is vested in a General Assembly consisting of a Senate and a House of Representatives. (Article 2, Section 1 of the Constitution of the State of Delaware of 1897.)

4. The composition of the House and Senate of the General Assembly was established by the provisions of Article 2, Section 2 of the Constitution of the State of Delaware of 1897. This section divides the State of Delaware into 35 geographical representative districts and provides that the qualified electors of each district shall elect one representative. This section also divides the State of Delaware into 17 geographical Senatorial districts from each of which a Senator is chosen by the qualified electors thereof.

5. Article 2 Section 2 of the Constitution of the State of Delaware of 1897 created 15 representative districts, numbered one to fifteen inclusive, in New Castle County; 10 representative districts, numbered one to ten inclusive, in Kent County and 10 representative districts, numbered from one to ten inclusive, in Sussex County.

6. Article 2 Section 2 of the Constitution of the State of Delaware of 1897 established seven senatorial districts, numbered one to seven inclusive, in New Castle County, five senatorial districts, numbered one to five inclusive, in Kent County and five senatorial districts, numbered one to five inclusive in Sussex County.

7. The apportionment of the State of Delaware into the above representative and senatorial districts was the result of a Constitutional Convention convened at Dover,

Delaware on December 1, 1896 for the purpose of revising the Constitution of the State of Delaware of 1831. As a result of such constitutional convention the present known as the Constitution of the State of Delaware of 1897 containing, inter alia, Section 2, Article 2 became effective June 10, 1897 and remains in full force and effect.

8. The Constitution of the State of Delaware of 1897 contains no provisions for Initiative or Referendum. It contains no requirements for periodic reapportionment. Thus, reapportionment within the framework of the Constitution can be accomplished only by either a constitutional amendment to Article 2, Section 2 or by means of a Constitutional Convention called for the purpose of adopting, inter alia, reapportionment of the General Assembly.

9. At the time of the adoption of the Constitution of the State of Delaware of 1897 as aforesaid the population of the State of Delaware was approximately 180,000 inhabitants, of which approximately 105,000 persons resided in New Castle County, 70,000 of whom resided in the City of Wilmington, and 35,000 resided in rural New Castle County. Kent County had a population of 32,000 and Sussex County a population of 38,000. (Page 273 . . . "Population of Delaware Table 1"—Plaintiffs' Exhibit #3 to the Dolan deposition . . .)

10. At the time of the adoption of the Constitution of the State of Delaware of 1897 the inhabitants of rural New Castle County, Kent County and Sussex Counties were considered to be identical insofar as their occupations and vocations were concerned and population was substantially equal and accordingly each county was apportioned to the then existing population so that each rural area had ten representatives in the House of Representatives and five Senators in the Senate of the Delaware General Assembly. The City of Wilmington with a popu-

lation of 70,000 persons was accorded special consideration and was allotted five representatives in the House of Representatives and two Senators in the Senate of the General Assembly of the State of Delaware (Vol. 3: *Debates and Proceedings of the Constitutional Convention of the State of Delaware*, pp. 2008-2112; 2029-2031).

11. By April 1, 1930, according to the 15th Census of the United States, the population of the State of Delaware had increased to 238,380 inhabitants which represented an increase of 15,374 or 6.9% as compared with the population on January 1, 1920 (15th Census of the United States: 1930, published by the United States Department of Commerce, Bureau of the Census—Plaintiffs' Exhibit #4 to the Dolan Deposition).

12. In 1930 New Castle County had grown to 161,032 inhabitants of which 106,597 resided in the City of Wilmington, 54,435 resided in rural New Castle County, while Kent County had a population of 31,841 and Sussex County had a population of 45,507 (see pages 4 and 5 of the Exhibit referred to in the preceding paragraph).

13. By 1960 the total population of the State of Delaware had increased to 446,292 inhabitants of which 307,446 resided in New Castle County. Of these inhabitants, 95,827 resided in the City of Wilmington and 211,619 resided in rural New Castle County. In the same year 65,651 persons resided in Kent County and 73,195 persons inhabited Sussex County (United States Census of Population, 1960, published by the United States Department of Commerce, Bureau of Census—Plaintiffs' Exhibit #2 to the Dolan Deposition).

14. The populations of the 35 representative districts established by the existing apportionment, provided in Article 2, §2 of the Constitution of the State of Delaware of 1897, for the years 1890 through 1960, are as follows:

New Castle County Dist.	1890	1900	1910	1920	1930	1940	1950	1960
1					11,513	12,262	11,515	7,814
2					31,299	35,082	35,762	33,772
3					21,222	22,843	21,417	18,359
4					9,352	9,877	9,078	5,394
5					31,446	32,440	32,584	30,488
Total Wilm.	61,431	76,508	87,411	110,168	106,597	112,504	110,356	95,827
6	3,994	3,899	4,440	6,451	10,917	14,426	24,039	58,228
7	6,144	4,736	6,038	6,298	14,317	18,696	32,224	47,509
8	3,786	3,728	3,886	4,052	4,453	5,662	7,677	23,428
9	2,870	3,061	3,587	3,921	5,476	6,398	9,057	20,040
10	5,980	5,407	5,406	6,386	8,261	10,245	21,824	40,293
11	2,126	1,999	1,797	1,692	1,881	1,970	2,599	9,325
12	2,216	2,425	2,693	2,351	2,635	2,771	3,053	3,401
13	4,785	4,455	4,237	3,596	3,457	3,685	4,554	5,218
14	2,336	2,141	2,257	2,099	1,939	2,035	2,175	2,534
15	1,514	1,338	1,436	1,225	1,099	1,170	1,321	1,643
Total					54,435	67,058	108,523	211,619
Total NCC	97,182	109,697	123,188	148,239	161,032	179,562	218,879	307,446
Kent County								
1	4,372	4,228	3,627	3,521	3,229	3,506	4,422	6,084
2			3,046	2,623	3,133	3,530	4,248	17,806
3	2,885	3,144	3,032	2,831	2,586	2,527	2,671	3,361
4			2,709	2,439	2,292	2,502	2,555	3,716
5			3,771	3,927	4,363	5,169	6,052	9,125
6		1,242	2,941	2,500	2,352	2,284	2,168	2,626
7			3,252	3,229	3,393	3,745	3,838	7,880
8			3,331	3,000	3,040	3,200	3,269	5,168
9			3,945	3,920	4,043	4,288	4,418	4,956
10	3,364	3,118	3,067	3,033	3,410	3,700	4,229	4,929
Total:			32,721	31,023	31,841	34,441	37,870	65,651
Sussex County								
1	3,913	4,117	5,060	5,079	5,276	5,936	7,254	9,641
2	2,793	3,456	5,329	4,589	4,329	5,315	5,849	6,439
3	3,223	3,779	5,174	5,346	5,182	6,350	7,815	9,437
4	3,074	3,132	3,352	2,761	2,955	3,448	4,446	5,318
5	4,511	5,112	5,980	6,362	6,319	6,804	7,139	8,140
6	3,495	3,575	4,979	4,513	4,836	5,779	6,470	8,010
7			4,770	4,016	4,755	5,415	6,195	6,623
8			1,884	1,821	1,803	1,864	2,536	2,957
9	2,436	2,874	3,028	3,071	3,062	3,456	3,563	4,271
10	2,997	3,959	6,857	6,183	6,990	8,135	10,069	12,359
Total:			46,413	43,741	45,507	52,502	61,336	73,195

(Table 5 Population of States and Territories by Minor Civil Divisions; 1890 and 1900, Delaware (Form 12 Census of the United States, Population, Volume I); 15th Census of the United States: 1930, Population Bulletin, First series Delaware, Number and Distribution of Inhabitants; 1960 Census of Population, Number of Inhabitants, Delaware, Final Report P. C. (1)—9A—Plaintiffs' Exhibits 2, 3, 4, 5, 10, 11 and 12 to the Dolan Deposition.)

15. That the mathematical computations set out in paragraphs 21, 22, 23 and 24 relating to the disparity of vote and representation in the various representative districts respectively are true, accurate and correct; that as a result of the change in population the representative districts range in size from 1,643 inhabitants of the New Castle 15th District of Blackbird Hundred to 58,228 inhabitants of the New Castle 6th Representative District of Brandywine Hundred, thus producing a circumstance where a vote in the 15th Representative District is equal to that of the 6th Representative District of New Castle County, although the population of the latter district is more than 35 times that of the former. Furthermore, 18 representative districts with the least population and containing only 18.47% of the state's population may elect a majority of the members of the House of Representatives. The inhabitants of the 18 least populated representative districts is less in number than the two districts having the heaviest concentration of population, the smaller, however, electing 18 representatives in the House of Representatives and the latter electing 2 representatives in the House of Representatives of the Delaware General Assembly. In accordance with the 1960 Census, more than one-half of the entire population of the state of Delaware, 233,718 persons, live in six representative districts and the representatives of such districts have the same voting power in the General Assembly as those representatives of but 16,552 persons residing in the 6 least populous representative districts of the State of Delaware.

16. A similar situation exists with regard to the Senatorial Districts established by the Constitution of 1897, where 7 senators are apportioned to New Castle County, which had a population in 1960 of 307,446 inhabitants as compared with 5 senators in Kent County, having a population of 65,651 inhabitants, and with Sussex County having 5 senators, with a population of 73,195 persons. Of the 7 senators from New Castle County, 5 represent the rural area, having a population of 211,619 inhabitants. The City of Wilmington with a population of 95,827 inhabitants, as contrasted with Kent and Sussex Counties, is allotted 2 senatorial representatives in the General Assembly, as contrasted with 5 for each of the county geographical units.

17. The 17 senatorial districts established by Article 2, § 2 of the Constitution of the State of Delaware of 1897 vary greatly in the number of inhabitants residing therein. The population of these districts from 1930 through 1960, with the percentage of change in each, is as follows:

		Population				% Change		
County	*Dist.*	*1930*	*1940*	*1950*	*1960*	*1940/ 1930*	*1950/ 1940*	*1960/ 1950*
New Castle	1	52,521	57,925	57,089	52,131	+ 10	— 1	— 9
	2	54,076	54,579	53,177	43,696	+ 1	— 3	— 18
	3	12,778	16,856	28,228	64,345	+ 32	+ 67	+ 128
	4	16,909	21,928	35,712	64,820	+ 30	+ 63	+ 81
	5	16,372	19,414	33,934	63,734	+ 19	+ 75	+ 88
	6	5,338	5,655	7,153	14,543	+ 6	+ 26	+ 103
	7	3,038	3,205	3,496	4,177	+ 5	+ 9	+ 19
Kent	1	6,362	7,036	8,670	23,890	+ 11	+ 23	+ 176
	2	4,878	5,029	5,226	7,077	+ 3	+ 4	+ 35
	3	7,756	8,914	9,890	17,005	+ 15	+ 11	+ 72
	4	6,395	6,562	6,586	7,582	+ 3	—	+ 15
	5	6,450	6,900	7,498	10,087	+ 7	+ 9	+ 35
Sussex	1	9,605	11,251	13,103	16,080	+ 17	+ 16	+ 23
	2	8,137	9,798	12,261	14,755	+ 20	+ 25	+ 20
	3	11,155	12,583	13,609	16,150	+ 13	+ 8	+ 19
	4	6,558	7,279	8,731	9,580	+ 11	+ 20	+ 10
	5	10,052	11,591	13,632	16,630	+ 15	+ 18	+ 22

(Lieberman and Rosbrow, "The Delaware Citizen" Welfare Council, "Population of Minor Civil Divisions (Representative Districts) in the Counties of Delaware, 1950 and 1960".)

18. The 17 senatorial districts established by Article 2, § 2 of the Constitution of 1897 range in size from approximately 70,000 to approximately 4,000. The vote in the General Assembly of the smallest senatorial district is equal to that of the largest senatorial district which exceeds it in population by more than 17 times. The apportionment established by the Constitution with respect to the Senate permits 22% of the voters of the State of Delaware to elect a controlling majority in the Delaware Senate.

19. The material result of the uneven growth of the different areas of the state has created a condition wherein the number of inhabitants in representative and senatorial districts differ not only on an inter-county basis but also adheres on an intra-county basis. It further manifests itself even among the representative districts of the City of Wilmington, thus in the House of Representatives the 4th Representative District of Wilmington, having 5,394 inhabitants, has the same representation in the House as the 2nd Representative District with 33,772 inhabitants and the 5th Representative District having 30,488 inhabitants.

20. Subsequent to the filing of this action the General Assembly of the State of Delaware enacted House Bill 574 which purports to amend Article 2, § 2 of the Constitution of the State of Delaware of 1897. The Bill, which was enacted by the 121st General Assembly has been duly published and if enacted by the 122nd General Assembly would constitute an amendment to Article 2, § 2. In effect, it proposes the following:

(a) The creation of two additional senatorial districts in Kent and Sussex Counties increasing the total number

of senatorial districts throughout the state from 17 to 21, which would give 7 senators to each of the 3 counties.

(b) It creates approximately 20 additional representative districts by dividing the larger districts and by providing for additional representation for each increment of 15,000 population residing therein or any major fraction thereof.

(c) It provides further that the composition of any future Constitutional Convention, as provided in Article 16, § 2 of the Constitution of the State of Delaware of 1897, shall be made of the present representative districts plus 2 delegates from each county.

(d) It provides that the Governor and the chairman of the 2 major political parties shall serve as a reapportionment committee to apply the formula provided in the Bill after every Federal Decennial Census.

21. House Bill 574 would result in a House of Representatives composed as follows:

Dist.	*Pop.*		*Effect of House Bill No. 574*	*Average Population Per Representative*
1	7,814		Unchanged	7,814
2	33,772	City	Add 1 Representative	16,886
3	18,359	of	Unchanged	18,359
4	5,394	Wilm.	Unchanged	5,394
5	30,448		Add 1 Representative	15,244
6	58,228		Add 3 Representatives	14,557
7	47,509		Add 2 Representatives	15,836
8	23,428		Add 1 Representative	11,714
9	20,040		Unchanged	20,040
10	40,293		Add 2 Representatives	13,431
11	9,325		Unchanged	9,325
12	3,401		Unchanged	3,401
13	5,218		Unchanged	5,218
14	2,534		Unchanged	2,534
15	1,643		Unchanged	1,643

22. Through the provisions of House Bill 574 no reapportionment of the House of Representatives would occur in either Kent or Sussex Counties, resulting in the perpetuation of disparities between districts in Kent County of 7 to 1 and disparities in Sussex County of 4 to 1. In New Castle County, the disparities would amount to as much as 12 to 1.

23. House Bill 574 would result in a Senate composed as follows:

Dist.	*New Castle County*		*Effect of House Bill No. 574*	*Average Population Per Senate Dist.*
1	52,131		Unchanged	
2	43,696		Unchanged	
3	64,345		Unchanged	
4	64,820		Unchanged	
5	63,734		Unchanged	43,921
6	14,543		Unchanged	
7	4,177		Unchanged	
Total	307,446			
KENT COUNTY				
1	23,890		Unchanged	
2	7,077		Unchanged	
3	17,005		Unchanged	
4	7,582		Unchanged	9,378
5	10,097		Unchanged	
6		46,063		
7		19,584		
Total	65,651			
SUSSEX COUNTY				
1	16,080		Unchanged	
2	14,755		Unchanged	
3	16,150		Unchanged	10,456
4	9,580		Unchanged	
5	16,630		Unchanged	
6		38,975		
7		34,220		
Total	73,195			

24. Giving effect to House Bill 574 the population disparities between districts in New Castle County in the 7 senatorial districts would range from 4,177 in the 7th Senatorial District to 64,820 inhabitants in the 4th Senatorial District, or a ratio of better than 16 to 1. In Kent County the population disparities between districts range from 7,077 inhabitants in the 2nd Senatorial District to 46,063 in the 6th Senatorial District, or a ratio of approximately 6½ to 1, and in Sussex County the population disparities between districts range from 9,580 in the 4th Senatorial District to 38,000 in the 6th Senatorial District, or a ratio of better than 4½ to 1. The average population for each senatorial district in the three counties would range from 43,921 inhabitants in New Castle County for each senator elected therein to 9,378 persons in Kent County, or a ratio of better than 4½ to 1 between the counties.

25. The election of 7 senators to each county irrespective to population, creates a situation where Kent County with but 14.4% of the total state population will elect 1/3 of the Senate and Sussex County with but 16.6% of the total state population will elect 1/3 of the Senate. New Castle County with 61% of the total state population will also elect 1/3 of the Senate.

26. House Bill 574 adds two at-large senatorial districts in both Kent and Sussex Counties. Thus, residents of New Castle County would be entitled under House Bill 574 to vote for and elect 1 senator in the General Assembly of the State while the inhabitants of both Kent and Sussex Counties will elect 2 senators to represent them in the General Assembly of the state. The inhabitants of each senatorial district in New Castle County would elect a 1/21st part of the Senate, while inhabitants of each senatorial district of Kent and Sussex Counties would elect 2/21st of the Senate. New Castle County inhabitants number 307,466 or 69% of the total state population would

elect 1/3 of the Senate as would the 65.651 inhabitants of Kent County and the 73,195 residents of Sussex County, representing but 31% of the total state population.

27. House Bill 574 further provides that in the event a Constitutional Convention be called, as provided in Article 16, § 2 of the Constitution of 1897, the number of delegates and the method of electing them to such convention shall not be affected by the addition of representatives or representative districts created by House Bill 574 and that for the purpose of future Constitutional Conventions, the representative districts shall elect delegates thereto and shall remain as before.

28. Plaintiffs have introduced into evidence, a chart showing the collections by the Delaware State Tax Commission for the decade 1952 through 1961, which was received by the Court (Plaintiffs' exhibit #4). In such decade the State Tax Commission has collected a total of $239,000,000., of which $166,900,000.00 represented personal income taxes, $23,500,000.00 represented inheritance and estate taxes, $10,800,000.00 represented license fees and $16,200,000.00 represented cigarette tax collections. The State Tax Commission reports indicate that in excess of 92% of the total taxes have been collected in New Castle County in that period, that 3% were collected in Kent County and 5% were collected in Sussex County. Of the $166,900,000. collected for personal income taxes, approximately 92% were collected in New Castle County, 3% in Kent County and 5% in Sussex County. Of the $23,500,000. collected for inheritance and estate taxes, approximately 94% were collected in New Castle County, 2% in Kent County and 4% in Sussex County. Of the $10,800,000. collected for licenses, approximately 70% were collected in New Castle County, 12% in Kent County and 18% in Sussex County. Of the $16,200,000. collected by the Commission for cigarette taxes in the decade, approximately

72% were collected in New Castle County, 8% were collected in Kent County and 10% were collected in Sussex County.

29. The plaintiffs also introduced into evidence a chart showing the collections by the Delaware State Tax Commission based upon the same ten year total which was broken down to illustrate the amount of taxes collected by each of the three counties in accordance with their representation in the General Assembly (Plaintiffs' exhibit #3). This chart showed that in the ten year period of 1952 to 1961, the total amount of collections made by the Delaware State Tax Commission, excluding the franchise and corporation taxes, averaged approximately $13,000,000. per representative in New Castle County, less than $1,000,000. for each representative in Kent County and approximately $1,000,000. for each representative in Sussex County. This exhibit further shows that with regard to personal income taxes collected, New Castle County collected approximately $10,500,000. for each representative in the General Assembly, that Kent County collected less than $500,000. per representative in the General Assembly and that Sussex County collected approximately $800,000. per representative in the General Assembly.

30. Prior to the institution of this suit and the subsequent enactment of House Bill 574, the General Assembly of the State of Delaware in the six years prior to the institution of such suit, received approximately seven bills having as their object the reapportionment of the State of Delaware by either Constitutional Convention or Constitutional amendment. Prior to the inception of this action, each one of these bills, with the exception of one which was introduced by Senator Elwood M. Melson, failed to emerge from Committee. The Melson bill providing for reapportionment was voted out of the Senate Committee but was defeated. (Affidavits of Representative Robert N.

Downs, Representative T. Lees Bartleson, Senator Margaret R. Manning and Senator Reynolds du Pont)

31. Giving further effect to House Bill 574, Kent and Sussex Counties with 31% of the total state population will be able to control measures requiring a two-thirds vote in the Senate, including revenue measures and appointments by the Governor and will be able to override the executive veto.

32. In addition to the foregoing, plaintiffs and defendants admit the veracity of the facts contained in the affidavits which have been filed in support of their respective positions. They do not, however, admit the conclusions stated therein.

33. Representation strictly according to population is a comparatively new historical concept (D 57).

34. In many bodies similar to state legislatures, there is representation according to factors other than population (assemblies of other nations, Congress of the United States, the General Assembly of the United Nations, the House of Lords in England) (D 57).

35. One of the traditional concepts of state government in the United States is political area representation (D 92). Political area representation is used as a means of apportioning representation in legislative groups on an international and national basis, a state basis and a city basis (D 91). This would also be true on a county and local basis for example, New Castle County, Delaware (D 92).

36. Most of the states have representation in one of their houses, usually the Senate, on a county or political area basis (D 92).

37. The formation of representative districts in state government is normally the function of legislative branch of the government.

38. The prevailing theory of government in the United States is a bi-cameral system (D 90).

39. As to the unicameral system, the one in Nebraska was adopted in 1937 and although there have been attempts in approximately fifty per cent of the states since 1936, none has followed it (D 90).

40. The three lower counties on the Delaware River, part of William Penn's Colony, had a separate organization from any other colony. There was a legislature which met in the colonies and passed legislation for them which could be approved or disapproved by the representative of the governor of Pennsylvania (D 32).

41. In 1704, the three lower counties separated completely from the Province of Pennsylvania except for the governor-general (D 63).

42. The people who resided in the three counties joined together in 1776 and created an organization completely independent of the colony and the Commonwealth of Pennsylvania (D 63, 84). Delaware was not formed by the United States (D 84). For at least one hundred years prior to 1776 the counties had been in existence (D 82, 84).

43. From time to time there was a colonial assembly and later a state assembly or legislative body for the three lower counties on the Delaware River in which there was equal representation from each one of the three counties (D 63, 64). That persisted until the Constitution of 1897, having been embodied in the agreement of 1776, the Constitution of 1792 and the Constitution of 1831 (D 64).

44. In 1896 the population of the three counties, excluding Wilmington, was approximately equal (D 107). The Constitution of 1897 varied the pattern of equal representation from the three counties by adding five representatives for New Castle County and two for the City of Wilmington (D 64). The basis for this addition is not clear from the constitutional debates.

45. One part of Delaware is somewhat hilly and the other part is flat. This difference in topography, including proximity to a good harbor in the northern part of the state, among other factors, helped shape industry.

46. Pursuant to State Statutes, the counties exercise the following legislative functions or rights (D 96):

(a) To assess and levy, collect and receive taxes (D 93). 9 Del. C. § 8601, et seq.

(b) To appropriate and borrow money (D 94). 9 Del. C. §§ 4111, 4131, 4133, 1522, 1561, 1563, 6111, 6131, 6132, 6205.

(c) To establish pension plans for employees (D 94). 9 Del. C. § 1701, et seq.

(d) To appropriate money for the indigent sick (D 94). 9 Del. C. §§ 1801, 4204, 6205.

(e) To appropriate money for welfare purposes (D 94).

(f) In New Castle County to designate firemen and policemen. 9 Del. C. § 1903.

(g) To provide an ambulance and rescue service (D 94). 9 Del. C. § 2001.

(h) To name the policemen (D 95). 9 Del. C. § 1903.

(i) To exercise their duty with respect to ambulance and rescue services (D 95). 9 Del. C. § 2001, et seq.

(j) To supervise street and highway lighting if the taxable people within the area petition it; in that event the

Levy Court acts as a holding company to make the proper contract (D 95). 9 Del. C. § 2101.

(k) General supervision over sidewalks, fire hydrants, water mains, sanitary and drainage sewers, when fifty per cent or more of the taxable people in a certain area petition that this be done (D 96). 9 Del. C. § 503.

(l) To control garbage and refuse collection and disposal thereof (D 96). 9 Del. C. § 2401.

(m) As to New Castle County, jurisdiction with respect to planning and zoning (D 96). 9 Del. C. § 2601.

(n) Certain jurisdictional authority with respect to parks and recreation. 9 Del. C. §§ 610, 616.

47. The Register of Wills, Prothonotary, Sheriff, Coroner and Recorder of Deeds carry out the general state laws under the county government (D 96). 9 Del. C. § 9101 et seq., § 9502, et seq., § 9603, et seq.

48. In the colonial days the Levy Court had the power to administer alms houses, and were until 1935 overseers of roads. They also had the power to tax but did not make the general laws (D 132).

D AND E. THE PLAINTIFFS AND DEFENDANTS APPEAR TO AGREE THAT THERE ARE NO PURE QUESTIONS OF FACT WHICH REMAIN TO BE LITIGATED AND THAT THE FOLLOWING MIXED QUESTIONS OF LAW AND FACT REMAIN.

First as to the Plaintiffs—

1. Does the apportionment provided in Article 2, § 2 of the Constitution of the State of Delaware of 1897 constitute a rational apportionment or an invidious discrimination as to the plaintiffs within the purview of the Fourteenth Amendment of the Constitution of the United States?

2. Is there any rational basis or policy for the classification of representative districts and senatorial districts

or any rational policy for the existing representation disparities under § 2, Article 2 of the Constitution of the State of Delaware of 1897?

3. Does the apportionment provided in House Bill 574 constitute a rational apportionment or an invidious discrimination as to the plaintiffs within the purview of the Fourteenth Amendment of the Constitution of the United States?

4. Is there any rational policy for the representative disparities in the representative and senatorial districts contained in House Bill 574?

5. Does gross discrimination against the value of the legislative vote of the plaintiffs exist?

6. Does gross discrimination against the value of the legislative vote of residents exist between districts in the same county and between residents of adjoining districts whose status, living conditions and social characteristics are the same?

7. Is there any rational policy—a policy which provides for the protection of equal laws—apparent in the adoption of the enactment of House Bill 574?

8. Is there any rational basis or statement of policy in House Bill 574 to justify the allocation of senatorial districts so that there is equality of the number of senators among the counties and the two senators from each of the two southern counties run from districts overlapping those of the other five senators in such counties?

9. Is there any justification for the establishment in Delaware of the so-called Federal plan of legislative apportionment modeled on the United States Constitution for the United States Congress?

10. Does the representation in the General Assembly meet the tests of the due process or the equal protection clause of the Fourteenth Amendment of the Federal Constitution with regard to taxation of the citizens of the several counties and the City of Wilmington?

11. If the apportionment in Article 2, § 2 of the Constitution of the State of Delaware of 1897 constitutes invidious discrimination as to the plaintiffs, must not the provisions in House Bill 574 providing for the composition of future Constitutional Conventions also constitute an invidious discrimination as to the plaintiffs?

12. Whether both or either of the Houses of the Delaware General Assembly must be reapportioned.

13. What plan of reapportionment, if any, should be adopted?

F. List of the Exhibits.

The plaintiffs have introduced in evidence and will refer in the course of the trial to the following exhibits:

Exhibit 1—The deposition of Paul Dolan taken by the plaintiffs on July 18, 1962, to which are attached the following:

(1) Compendium on Legislative Apportionment.

(2) U. S. Census Population, 1960.

(3) Population, Delaware, Table 1.

(4) 15th Census, U. S. 1930.

(5) 1960 Population, Delaware.

(6) Exhibit A to Complaint.

(7) Exhibit B to Complaint.

(8) Page 226, "Government in the 50 States."

(9) Exhibit C to Complaint.

(10) Chart, Average Values of Vote for Representation as Percentages of State-Wide Average.

(11) Chart, Representation General Assembly of Delaware.

Exhibit 2—Affidavit of Honorable Elisha Dukes, Secretary of the State of Delaware re publication of House Bill 574.

Exhibit 3—Chart of collections by Delaware State Tax Commission.

Exhibit 4—Chart of collections of the Delaware State Tax Commission by county 1952-1961.

Exhibit 5—Chart of the population in each senatorial district.

Exhibit 6—Affidavit of Representative T. Lees Bartleson.

Exhibit 7—Affidavit of Senator Margaret R. Manning.

Exhibit 8—Affidavit of Senator Reynolds du Pont.

Exhibit 9—Affidavit of Representative Robert Downs.

Exhibit 10—Affidavit of Elwood Melson, Jr.

Exhibit 11—Affidavit of Sigmund Schorr.

Exhibit 12—Affidavit of Edwin W. Hutchinson.

Exhibit 13—Affidavit of A. Dean Betts.

Exhibit 14—Affidavit of Harold J. Carrow, Sr.

The above exhibits have been admitted in evidence for the purpose of final hearing.

G. Names and Addresses of Witnesses.

At the present time, plaintiffs expect to call as witnesses in the presentation of their case in chief the following persons:

(1) Professor Royce Hanson—American University, Washington, D. C.

(2) Dr. Paul Dolan—University of Delaware, Newark, Delaware.

(3) Cornelius B. Tyson—613 Halstead Road, Sharpley, Wilmington, Delaware.

(4) Cecil Liberman—835 Orange Street, Wilmington, Delaware.

Professor Hanson is an Assistant Professor of Government and Public Administration at the American University, Washington, D. C. He is the chairman of the Security Committee on State and Urban Studies and is engaged in teaching the following specialized areas:

(a) State Government

(b) Urban and Metropolitan Problems

(c) National Government and Politics

(d) American Political Theory

He is an authority on the subject of apportionment.

Professor Dolan is a professor of political science at the University of Delaware and is qualified as an expert in political science and apportionment.

Cecil Liberman is a political writer associated with the News Journal Company, Wilmington, Delaware. He has written a series of articles on apportionment and reapportionment in the State of Delaware and has, in conjunction with Mr. James Rosbrow, authored "The Delaware Citizen".

Mr. Tyson is an expert in the field of Taxation.

The defendants expect to produce Professor Harold B. Hancock, Professor of History at Otterbein College, Westerville, Ohio.

H. A Brief Statement of What Plaintiffs Expect to Prove in Support of Their Claim.

The plaintiffs expect to prove that Article 2, § 2 of the Constitution of the State of Delaware of 1897 invidiously discriminates against them by the dilution of their voting franchises insofar as it relates to general members of the State of Delaware. They will further show that House Bill 574 does not cure such invidious discrimination but instead perpetuates the same.

The plaintiffs have thoroughly briefed their position in this litigation and believe that a more detailed statement of its position in this Pre-Trial Order is not required. The current apportionment provisions of Article 2, § 2 of the Constitution of the State of Delaware of 1897 and the apportionment provisions contained in House Bill 574 operate so as to deprive plaintiffs and all others similarly situated of their rights and privileges without the due process of law and the equal protection of law.

I. A Brief Statement of What Defendants Intend to Prove as Their Defense.

The Defendants expect to prove—

1. That the apportionment established in Article 2, § 2 of the Delaware Constitution of 1897 and under House Bill 574 is rational and not invidiously discriminatory.

2. Both of the Houses of the Delaware General Assembly need not be reapportioned.

3. Any reapportionment of either House of the Delaware General Assembly need not be based upon population alone but other factors may be considered.

J. Statements by Counterclaimants or Crossclaimants.

None.

K. Amendments of Pleadings Desired by Any Party.

None.

L. Whether or Not the Possibility of Settlement Has Been Discussed.

The plaintiffs and defendants have discussed settlement.

M. Any Other Matters Which the Parties Deem Appropriate.

All parties reserve the right to object on grounds of lack of relevancy and/or materiality with respect to any fact contained herein.

N. This Order shall supplement the pleadings and govern the course of trial unless modified by the Court to prevent manifest injustice.

/s/ John Biggs, Jr.,
Chief Judge of the Court of Appeals.

/s/ Caleb M. Wright,
Chief Judge of the U. S. District Court.

/s/ Caleb R. Layton, III,
Judge of the United States District Court.

Approved:

/s/ VINCENT A. THEISEN,
Vincent A. Theisen,

/s/ VICTOR F. BATTAGLIA,
Victor F. Battaglia,
Attorneys for Plaintiffs.

/s/ JANUAR D. BOVE,
Januar D. Bove, Attorney General,

/s/ JAMES H. HUGHES, III,
James H. Hughes, III,

/s/ N. MAXSON TERRY,
N. Maxson Terry,

/s/ ROBERT W. TUNNELL,
Robert W. Tunnell,

/s/ FRANK O'DONNELL,
Frank O'Donnell,

/s/ WARREN B. BURT.
Warren B. Burt.

Dated January 7, 1963, at
Wilmington, Delaware.

2. EXCERPTS FROM THE TRANSCRIPT OF TESTIMONY.

(34)*

DR. PAUL DOLAN

[*Professor of Political Science, University of Delaware, called as a witness on behalf of the Plaintiffs, being duly sworn, testified as follows:*]

DIRECT EXAMINATION.

By Mr. Theisen:

Q. Dr. Dolan, what are the concepts which you as a political scientist in the science of government in the light of the equal protection clause of the 14th Amendment would require in any apportionment scheme in a legislature?

A. I would say that the legislature should be based on population; that the general axiom of one man, one vote should prevail.

By Judge Biggs:

Q. I didn't grasp that, Professor Dolan.

A. That if you had a population of a state and you were to have, let us say, 52 representatives, then you would divide the 52 into the total population and you'd come up with a quota, and you would try to establish in the geographical areas that so many people would have one vote in the legislature.

Judge Biggs: Thank you.

By Mr. Theisen:

Q. In other words, Dr. Dolan, if you had ten seats that you were going to apportion and you had a thousand popu-
(35)
lation——

A. 100 to each.

Q. You would try to allocate one seat to each 100 persons?

* Figures in parentheses refer to page numbers of typewritten transcript.

A. Yes, as nearly as you could. Of course, exactitude is very difficult to get.

Q. There are some deviations that you political scientists recognize from absolute equality in proportions?

A. Yes. One is the difficulty of mathematics. Another is the difficulty of change from a decennial period.

By Judge Wright:

Q. Dr. Dolan, are you speaking now of both Houses?

A. Of both Houses, yes, sir.

Q. It should be on a population basis?

A. The population basis should be the controlling thing. There may be some other factors for other postulates that would enter, but basically in my opinion it would be that both houses would have population as their cardinal base.

(36)

Q. What protection under your theory would there be for minority representation?

A. By minority representation you mean——

Q. I mean racial or economic groups.

A. Racial or economic groups?

Q. Racial, economic, or otherwise.

A. I feel that the representation should be across the board and that there are certain factors, economic, racial, and other minority factors that will appear generally throughout the State or the area that is being apportioned. They may not appear in the same preponderance one place to another.

• • •

(37)

Q. Isn't that one of the things that should be considered in a state legislature insofar as the Senate is concerned if there is to be a bicameral system?

A. If I may, sir, in going back to the concept of the Federal Government, there was a unique situation there in that there were sovereign states that somehow through their peoples joined into a Federal union. I do not mean to infer that the Federal Constitution was formed by the states. It was formed by the people of the United States. However, at the state level we have a different scheme of government. This is unitary government and it may well be that the Federal analogy could be badly taken.

Q. It could well be, but I am asking this specific question: Is not one of the objects of the bicameral legislature, whether it be in Delaware or whether it be, for example, in a country such as Sweden where there is a bicameral House,

(38)

that the bicameral House, which is usually the smaller group, is taken on a district system which does not bear the same relation to population as that of the more representative House?

A. Yes, this is quite true. For example, I would say the Rhode Island situation is often mentioned, certain islands off the coast which may not have the population in the full sense that a representative district would have on an equal basis, yet they get representation, the fact of their location and proximity to the state capital. The same thing, I think, has been true in the Michigan case where some representation was accorded to the districts lying in the peninsula.

Q. Isn't that a desirable principle?

A. If the situation would be the same in the State of Delaware where you have these outlying areas then I perhaps would see this, yes; but with the smallness of the state that we have here and easy communication and lack of distance, I fail to see the need for other factors, although I would not be adamant and say they should not apply.

• • •

(44)

Q. Dr. Dolan, what discrimination, if any, did you find in the representation that was given according to districts in 1897?

A. Well, for one, the district representation in the

(45)

15th District of New Castle County, there were 1,514 people. They received one vote in the legislature, in the lower House. And in the City of Wilmington, which received five votes, there were 61,000 people. So that if that were divided evenly by 5 and you came up with some 12,000 persons per vote in the City of Wilmington, there was a disparity there between any one of those districts in the City of Wilmington and the 15th.

Q. Well, isn't that disparity evident all the way through the remaining 30 districts of the State when you compare them with the districts in Wilmington?

A. Yes. The disparity lessens of course in some places.

Q. Was the same thing true in the Senate?

A. Yes. I don't have the exact figures here, but in view of the fact——

Q. Would the allocation of two Senators to the City of Wilmington out of 17 represent discrimination or non-discrimination with regard to Wilmington?

A. It would represent discrimination.

Q. Now, then, from your examination of the constitutional debates of 1897 could you find any reason, any rationale, for the discriminations that were perpetuated or drawn into this Constitution?

(46)

A. I could find none.

Q. Could you find any logical pattern evident in the division of the State, the reapportionment of the State, into

the 35 representative districts, in the 17 Senatorial districts?

A. I could find none. Having re-read those things in preparation for the case, I still cannot come to any basic assumptions which are adhered to throughout in the apportionment scheme. This is why I say it is irrational.

Q. Now, then, starting with what you consider to be an irrational situation in 1897 and referring you to Plaintiffs' chart No. 10, does this indicate an increase or a decrease in the discrimination which you found existed?

A. An increase in the discrimination.

Q. Throughout the years?

A. The imbalance has become more so as the years have gone on.

• • •

(47)

Q. Now, I call your attention to the 1st District in Wilmington, which is roughly 8,000, and your attention to the 2nd District of Wilmington, which is roughly 34,000 in population and ask you if there is any rational reason for that discrimination between those two districts?

A. To me it is irrational. I see no reason for the discrimination.

• • •

By Mr. Theisen:

Q. I ask you this as a political scientist, not as an individual, but as a political scientist, can you find any rational basis for that discrimination?

A. I cannot.

Q. Can you find any rational basis for the discrimination between Districts 4 and 3, which are beside each other, in the City of Wilmington?

A. No, I cannot.

(48)

Q. Can you detect any rationale for the discrimination between 4 and 5 in the District?

A. I cannot.

Q. Can you find any rationale or pattern or reason for the discrimination which currently exists in the 6th Representative District as contrasted to the 5th which is right next to it?

A. I cannot.

Q. Can you find any rational pattern or reason for the discrimination between the 15th District and the 6th District which is 35 times in size?

A. No. The answer is the same. There is no basis for this in the Constitution.

* * *

(54)

By Mr. Theisen:

Q. Now, then, Dr. Dolan, did you follow the enactment of House Bill 574 and the enactment of House Bill 3 as they passed from the bi partisan committee through final passage on Thursday of last week?

A. Yes, I did.

Q. I call your attention to Plaintiffs' Exhibit 16 and ask you if you have examined that chart which purports to be the proposed districts in the State Senate as set up

(55)

by the new amendment?

A. I have.

Q. Is it a true and accurate representation of the population of each one of those districts?

A. Yes.

Q. Now, one of the provisions of the new amendment was to create two additional Senators for both Kent and Sussex Counties; is that not correct?

A. Yes.

Q. The amendment increased the size of the Senate from 17 to 21, did it not?

A. Yes.

Q. You stated you followed the passage. Do you know of any rational basis on which you could place the establishment of those two additional Senators in Kent and Sussex County as a political scientist?

A. No, I do not.

* * *

(56)

Q. Do you notice that under the amendment to the Constitution the 15th District of New Castle County which

(57)

now we have numbered 25, because there will be 25 districts in all, and I point to it specifically, Doctor—Is it true that that will remain at the figure of 1,643 inhabitants for a representative seat?

A. During this next census, yes; during this next decade, yes.

Q. And will always remain, will it not, until what figure is reached?

A. Until 22,500——

Q. And 1?

A. And 1, yes, sir.

Q. On this chart we have indicated that the districts will range from the 1,643 in what will then be the 25th District or the old 15th, to the 20,000 in the 17th District, which is the old 9th District and which has 20,040 inhabitants, which, as I have calculated it, is a disparity of, I believe, 12½ to 1. Is there any rational basis that you know of for such a deviation?

A. I find none.

Q. Do you find any rational basis for the deviation in the 5th District which has a population of approximately

6,000 as contrasted with the one immediately next to it, the 4th, which has a population of approximately 18,500?

A. I do not.

(58)

Q. Is the same thing true, Dr. Dolan, with regard to the districts that are to be found now in Kent and Sussex Counties which remain as they were before?

A. Yes, the same thing is true.

Q. So that insofar as your observations were concerned with the two lower counties' seats in the House of Representatives your testimony is precisely the same under this amendment as it was under Article 2, Section 2; is that not right?

A. Yes. The disparity may not be as great between some of the districts in New Castle County.

Q. In the county itself it remains the same; is that correct?

A. Yes.

Q. And those disparities are 7 to 1 in Kent County and 4 to 1 in Sussex; is that correct?

A. That is right.

Q. You were about to tell the Court your views with regard to the representation in the Senate under the new bill.

A. Yes, with respect to Kent and Sussex Counties, your Honors, these two so-called super-Senatorial districts are made up under present House Bill 574, now the amended Constitution, they are made up of specified districts, and counsel read those districts. Suppose any one of those representative districts did reach the figure of 22,501, it would be

(59)

split. Now, into what super-Senatorial district would that split be fitted? This I have not been able to find out and there is no provision for it made in the Constitution as far as I know—the amendment. That is what I had in mind.

By Judge Wright:

Q. This is an amendment to the Constitution?

A. Yes.

Q. Why didn't they just make two districts down there and if they wanted to have representation on the west side and the east side why didn't they just go ahead and put a representative district on the west side and a representative district on the east side in new districts?

A. I thought about this, but I could not come up with an answer.

Q. There would have been at least some rationale in that, do you agree?

A. Well, if I may, sir, I don't see it if there are no super-Senators in New Castle County. If the two down-state counties are treated separately from New Castle then the basis is not on county——

Q. Maybe I should have used the word "logic" instead of rationale.

A. They mean the same to me, sir.

(60)

By Mr. Theisen:

Q. Dr. Dolan, as a political scientist is there any rational basis whatsoever that you can think of for giving a county area having 65,651 inhabitants two additional Senators as opposed to another county area, if you will, having 307,000 in population?

A. No, I can't see any. That was the point of my previous answer.

Q. And the same would be true of Sussex County with a population of 73,000 as opposed to New Castle County with 307,000?

A. Yes.

(61)

Q. As a political scientist is there any justification for applying the Federal analogy to the State of Delaware?

A. No, and I don't see how you could apply it to any

(62)

State in the Union.

Q. Your reasons are what?

A. The states are unitary governments. They are a competency within the Federal system of government as is the Federal Government a competency. But to give the counties a sovereignty would be to create a third competency, and this would be unconstitutional.

By Judge Biggs:

Q. What do you mean by the word "competency"?

A. The ability to control the internal police power of the district. It corresponds perhaps with the word "sovereignty".

Q. You mean police or policy?

A. When I say "police" I mean the ability to maintain the order of the community without interference or without authority from some other competency or constituency or sovereignty, if you will. I dislike to use the word "sovereignty" here because I don't think the states are sovereign in the sense that England or the United States is sovereign or sovereign one to each other.

Q. Without being too semantic about this, your point is, as I take it, that you can see no basis why New Castle County or Kent or Sussex, treating them as individual counties, should have any greater power to determine policy than

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any other of the two counties?

A. What I meant was that they do not determine policy in and of themselves within their own borders.

Q. Their territorial limits?

A. That is right. They get their authority from the State Legislature, whereas the State of Delaware does not

get its authority from the Federal legislature or from the Federal Constitution.

By Mr. Theisen:

Q. As a matter of fact, under our system of state government what is the position of a county?

A. A county is a political sub-division.

Q. From what source does it derive its power?

A. From the State Legislature.

Q. And what the State Legislature gives it can certainly take away?

A. It can abolish it.

Q. A county might be wiped out by state action?

A. Could a county wipe out a state?

A. No. I would like to qualify the first statement: If there is in the Constitution certain provisions about home rule for counties then the legislature itself could not eliminate the county.

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By Judge Biggs:

Q. But barring constitutional prohibition the State Legislature could in fact abolish counties?

A. Yes, and has done so. There are at least two states, I think, in the American union that have no counties in them.

Q. What are those two?

A. I think one is Alaska and the other is Connecticut. I am not sure, sir.

Q. I think you are correct as to Alaska. I was not sure as to Connecticut.

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By Mr. Theisen:

Q. Professor Dolan, returning to the amendment to the Constitution and referring more specifically to the

State Senate which you have discussed, is it now true that under the amendment a resident of New Castle County will vote for one Senator and that a resident of Kent County will vote for and elect two Senators?

A. He may not elect them. He will vote for them, yes.

Q. The same is true in Sussex?

A. Yes.

Q. Well, presupposing that there will be two candidates for the Senate, a resident of Kent and Sussex County will each elect two Senators; is that correct?

A. Yes.

Q. So that under the amendment a resident of New Castle County would be voting for one-third of the Senate representation?

A. That is correct.

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Q. With 70 per cent of the population of the State; Kent County with 65,000 out of a total population of 446,000 would now be voting—each voter would be voting for and hopefully electing two Senators, and the same would be true of Sussex County with 68,000?

A. Each county would elect a third of the Senatorial representation.

Q. Is there any rational basis for this in the field of political science that you know of?

A. I see none under this set-up. It does not take into consideration the disparities in the population at all.

Q. Dr. Dolan, you have written several books on government in Delaware?

A. Just two.

Q. You have been a member of the faculty at the University of Delaware and you have traveled quite extensively, have you not, throughout the length and breadth of Delaware?

A. Yes.

Q. Do you find any great disparity in the kind of people you find in Sussex County as compared with the people you find in the northern part of the State?

A. You mean disparity between the two?

Q. Do you find any great difference?

A. No, I can't tell one from another.

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Q. Dr. Dolan, this morning when we talked about the amendment to the Constitution I had questioned you about both the House and the Senate make-up under the new bill, the new Constitution. I had neglected, however, to ask you another very important question relating to the make-up of all future constitutional conventions.

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Mr. O'Donnell: The complaint in this action is not directed at constitutional conventions, therefore any questions with respect to the same would be irrelevant.

Judge Biggs: We will take it subject to a motion to strike.

Mr. Theisen: Your Honors remember that at some——

Judge Biggs: We made the ruling. Go ahead and ask it.

Mr. Theisen: All right.

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By Mr. Theisen:

Q. Section 6 of the amendment provides in substance that the number of delegates and the method of electing delegates to the constitutional convention as provided in Section 2, Article 16 of the Constitution of 1897 shall not be effected——

It should be "affected."

—by addition of representatives or representative districts pursuant to Section 2A of the bill.

In other words, the representative districts which shall elect delegates to any future constitutional convention shall remain as they were prior to the amendment in old Article 2, Section 2?

A. That is my understanding. Yes.

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Q. Do you care to comment upon that phase of the bill?

A. I fail to see the rationale of the present constitutional convention with its 41 members based as it is, 35 of them on districts, which were the old districts, and the 6 other members coming two from each county.

I fail to see how that is connected with the new apportionment. For example, if we took the 9th District, it has 20,000 inhabitants, it is entitled to one representative seat. If that by some chance were to be split into two or more districts that second, or third, or fourth district hewn from the original one would not send a man to the constitutional convention. The district would then, that sent the man to the constitutional convention, would have to be in a way reconstituted; it would have to come back to the old 9th. I don't understand how this will be done. It would still place, then, the constitutional convention on a purely geographical base.

Q. If we took for example, the old 6th District,

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which under the amendment adds three representatives to that district, as I understand the bill that old 9th District is divided in some way into four districts, one, I suppose, is the 9th, and then the bill says additional new representative districts shall be created.

A. Yes.

Q. Do you know how those new representative districts are to be created?

A. Well, they are to be established, I understand, under this constitutional amendment by a commission which will be—which will divide the old district on a proportional basis into new districts following ancient boundary marks, etcetera, contiguity, without any attempt to gerrymander or disproportional.

Q. What becomes of the old district?

A. Apparently it is in limbo until a constitutional convention is called, and it is reconstituted, as I understand it.

Q. This is despite subsequent divisions of new districts and so forth?

A. This could go on, yes, ad infinitum.

Q. And if a constitutional convention were to be called, the delegates would then be selected from the old district which was established in 1897?

(82)

A. That is my understanding, yes.

Q. Is there any rational basis as a political scientist for such treatment?

A. I see none.

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Q. Under such a call for a constitutional convention would there be true representation of the population of the State?

A. No.

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(86)

By Mr. Theisen:

Q. Professor Dolan, if the amendment to the Constitution is permitted to stand and if in effect 30 per cent of the population of the State in the Senate is to control two-

thirds of the majority of the Senate and that 70 per cent of the population is to get but one-third representation, what is the effect of such a set of circumstances upon the conduct

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of the Senate vis-a-vis the conduct of the House of Representatives?

A. Well, it gives preponderant power to the 30 per cent of the population. The Senate would be two-thirds in the hands of 30 per cent of the population, and the Senate, as you know, has power in addition to that of the House. It makes confirmations. Also under the Constitution now existing municipalities are created by two-thirds vote, or laws affecting municipalities by two-thirds. This would give the Senate equal power, of course, with the House but much greater power to the 30 per cent whom it represented. Constitutional change is a two-thirds vote.

I think one other point might be mentioned, and that is that it detracts from some of the powers that are given to the House as such. The House has to do with the initiation of money bills. This is a prerogative of the more populous representative bodies, more popularly elected representative bodies, and in a way it would place the Senate in a position to control, I think, pretty much a money bill—overweaningly so because it has more power in that sense than the House would. The House would be based on a quasi-population basis—at least one of the bases would be population, it might be inferred—but the Senate, not being so, but with a two-thirds power, would probably be able to contravene the

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House on money bills.

Q. Taking into account, Professor Dolan, your experience in government in this State and writing about it, your study of the Constitution of 1897, the broad general make-

up of the State of Delaware, considering its population, can you telll us as a political scientist whether in your opinion the Senate of the General Assembly of this State should be based upon a population basis?

A. I think that one of the controlling bases for both Houses is population, Senate as well as the House.

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DR. ROYCE HANSON

[*Associate Professor of Government and Public Administration at the American University, Washington, D. C., called as a witness on behalf of the Plaintiffs, being duly sworn, testified as follows:*]

Direct Examination.

By Mr. Theisen:

Q. Now, Professor Hanson, are you familiar with the apportionment of representation in the Delaware General Assembly as provided in Article 2, Section 2, of the Constitution of 1897?

A. Yes, I am.

Q. And are you also aware of the apportionment provided in the recent amendment to that Section?

A. Yes.

Q. Have you also examined the debates of the Constitution of 1897?

A. Yes, I have.

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Q. Have you examined and are you familiar with the census reports of the United States Department of Commerce dating from 1890 to 1960 insofar as it relates to the State of Delaware?

A. Insofar as they are stipulated in your pre-trial order, yes.

Q. Are you familiar with the content of the pre-trial order?

A. Yes.

Q. Have you examined it?

A. Yes, I have.

Q. Now, Dr. Hanson, as a political scientist working in the field of reapportionment would you care to state to the Court the basic concepts which you as a member of the political science field are familiar with and state also the basic concepts which are applied under the equal protection clause of the 14th Amendment insofar as they both relate to schemes of reapportionment?

A. Well, first, the overriding consideration in apportionment is the relationship of representation to population, to people. I think, after seeing that there is a reasonable, or close relationship between population and representation, one would look, if there are legislative districts or are to be legislative districts, for such criteria as the

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compactness of the districts and the contiguity of the territory of which they are composed.

As to the second part of your question, the equal protection clause requires that in the things to which it applies, there be no invidious discrimination. The equal protection clause permits a state to establish classifications of persons or things if the law which establishes that classification is in the first instance a permissible state policy.

It requires in general that any distinction among classes created by the law be such as not to result in invidious discrimination, nor can they be drawn in such a way that in the first instance it is apparent on their face that their purpose is to invidiously discriminate.

Finally, it would provide that there may be no distinctions among those similarly situated within the same class, that if persons are put in the same class they may not be treated differently, nor may the class be drawn in such a

way that persons obviously of the same type or same class are arbitrarily assigned to separate classes.

Q. Doctor, have you applied those tests, those basic concepts, to the population figures to be found in pages 12 and 13 of the pre-trial order that is before this Court?

A. Yes.

Q. And have you examined the chart that we have pre-

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pared which sets forth the 1960 population figures insofar as they relate to both the House and the Senate of the General Assembly?

A. Yes, but I can't see it all from here.

(Mr. Theisen then moved the chart for the witness.)

Doctor, going back first, if I may, to the convention of 1897 and the stated population figures that existed as of that date, may I ask you if you are familiar with those population figures?

A. Yes, I am. I have them here.

Q. More specifically I call your attention to page 9 of the pre-trial order where it appears that in 1897 there were 180,000 inhabitants, of which 105,000 resided in New Castle County, 70,000 of whom resided in the City of Wilmington and 35,000 resided in rural New Castle County, 32,000 in Kent County, and 38,000 in Sussex County.

A. That is correct.

Q. Applying the concepts that you have referred to a moment ago to those population figures, do you find any rational policy within the concept of the 14th Amendment in the apportionment that was adopted by the Constitutional Convention of 1897?

A. Well, I can't see any rationality within this context in assigning—first, my answer has to be divided into two

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parts. First, assuming that the assignment of representatives was to the counties. Now, on that assumption itself

it would not appear, or there is nothing that appears rational in giving New Castle County 15 and each of the other counties 10. This certainly cannot be justified on the basis of proportions in order of population. The justification given in the debates, as I recall, was that rural New Castle had approximately the same population as Kent and Sussex and consequently should have about the same representation or should have the same representation. The disparity was not enough to bother anyone.

This, up to this point, would appear to be both reasonable and rational within the applications of equal protection. But then when you come to the next step of giving the five additional representatives to New Castle, they are awarded in such a way that they all fall within the City of Wilmington, which had in itself a population equal to the combined populations of Sussex and Kent and almost exactly twice the population of rural New Castle. Now, if there is any rationality to that, I can't find it. The only thing that can conceivably cross my mind on it is that because they have got twice as much population, they get half as much representation. But this does not follow.

I think even if you assume the method applied to

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the rural counties, this does not follow, that is, if you assume that the assignment is made to the counties. But the assignment, as I read the Constitution, is not made to the counties but is made to 35 representative districts.

Now, these 35 representative districts, even based on the 1890 census which you have on pages 12 and 13, in rural New Castle County you find variations roughly of 1 to 5, or at least 1 to 4, as between the 15th District and the 17th District of rural New Castle County.

You find in Sussex County not very great variations—perhaps 1½ to 1—one approach is 2 to 1, but I guess it is closer to 1½ to 1. But even in rural New Castle there is

no systematic consistent method for assigning these representatives that has any relationship to population.

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Q. Is it your conclusion, Doctor, that the Constitution of 1897, in providing for the apportionment in the House, as we have mentioned, did not provide a rational plan in the

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14th Amendment sense?

A. I think that would be correct. If that were applied to the situation as existed then, I should not think that it would meet these tests.

Q. Now, then, may I ask you next about the apportionment in the Constitution of 1897 insofar as it related to the Senate.

A. Yes.

Q. You will recall that the Constitution provided for 17 Senatorial Districts throughout the State?

A. Yes.

Q. 7 of which were to be located in New Castle County, 5 in each of the other two counties?

A. That is right.

Q. Have you examined the Constitution in the light of that apportionment?

A. Yes, and I think the same thing can be said for the apportionment of the State Senate. I think in your statement of facts——

Q. I call your attention to pages 14 and 15, just to help you.

A. Yes. On page 15, for example, in New Castle County in 1930, which was the earliest census figure that you have here, the 7th Senatorial District had 3,038 people, and the

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2nd Senatorial District had 54,076. You can find disparities of lesser range in the other counties.

* * *

Q. That is correct. Let me ask you this: In 1897, where you had 70,000 population in the City of Wilmington and you assigned to it two Senators and you had a rural population in New Castle County of 35,000 and you assigned to it five Senators, 32,000 in Kent County with five Senators and 38,000 in Sussex County with five Senators, applying the basic concepts that you have referred to in your testimony with regard to the House, do you care to comment on the apportionment of the Senate under the 1897 Constitution?

A. Well, again first assuming that the apportionment of Senators was made to counties, certainly New Castle had more population than Kent and Sussex and should have had more Senators. It had considerably more, though, if you use population as your base—it should have had more than seven Senators.

(160).

Obviously population then was not the basis of the apportionment. Both from the debates and from the effect it is obvious that county equality was not the criterion that was used. I doubt that county equality is an acceptable criterion in any event. But even if it were, it was not used as the basis since one has seven and the other two five.

Within New Castle County there is no discernible criterion if you consider New Castle a class in itself or giving two Senators to a population of 70,000 and five to a population of 35,000.

* * *

Q. Now, then, Doctor, calling your attention to Plaintiffs' Exhibit No. 10, which is a population of Delaware,

1890 through 1960, State and counties, totaled by decade, starting at 1890, and calling your attention to the progression through 1960, what has been the position of the

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New Castle County representation during the years?

A. New Castle County's representation has stayed the same; so has the representation of Kent and Sussex. The representation was frozen. In a sense what the 1897 Constitution does is to create a constitutional minimum and leave it at that, a constitutional freeze, and arbitrarily assigns a certain number of Senators and Representatives to each county or arbitrarily draws lines around a territory and assigns one each to these lines. This is a sort of a silent gerrymander which means as the population within these boundaries has increased there has been no representative outlet for this increase in population. It has been constitutionally fixed and there has been no way to change this short of changing the Constitution.

Q. So that would you say that as the population of the State increased this fixed geographical unit that was selected as the representative district would necessarily result in silent gerrymandering?

A. It would not necessarily result in it if you had no population changes and you were fair to start with; but you have had population changes and it has necessarily resulted in silent gerrymandering of quite large proportions.

I think you get in the House the 15th District, as your facts state, has around 1,600 people, and another dis-

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trict has 58,000. This is on the order of 35 to 1. You get a disparity on the order of 17 to 1 in the State Senate.

The history has been no change was made in the district boundaries, the disparity increased.

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Q. I call your attention to the Delaware State Senate proposed districts by population, House Bill 574, and ask you, please, to ignore the 6th and 7th Districts in Kent and Sussex Counties.

A. Yes.

Q. Does that chart, with the exception of those districts, represent the apportionment in the State Senate that existed in 1960?

A. Yes.

Q. What are the discrepancies you find in it?

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The Witness: There are discrepancies of two types; one is the range of discrepancy, the total range of discrepancy, between districts, again 17 to 1 between the smallest and largest in New Castle.

I don't think the average number of people per Senator in the counties is very meaningful here because they are not elected on the basis of counties, but that would be a discrepancy in itself.

Thirdly, within Kent and within Sussex between one district and another you find considerable variation between one district and another.

By Mr. Theisen:

Q. Would you, Doctor, as a political scientist, classify these as grossly disproportionate?

A. I think that is apparent.

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Q. Based upon the 1960 census, and taking into account the House and Senate as it then remained under Article 2, Section 2, do you have any idea of how Delaware ranked as a state in the fifty states of the Union?

A. Well, one of the scales that is commonly used to rank the representativeness of legislatures, which is a scale devised upon the percentage of the population that it takes to control both Houses, to elect a majority of both Houses of the legislature, it would rank about 48th, or third from the

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worst.

Q. Third from the worst.

By Judge Biggs:

Q. Whom do you consider the worst?

A. Rather "least representative" would be the more appropriate phrase. Florida, your Honor.

By Mr. Theisen:

Q. Now, Doctor, have you also considered the amendment to Article 2, Section 2?

A. Yes. 574?

Q. Yes. Would you care to comment on the amendment 574 and what it has done to the Legislature of our State?

A. Well, 574, the amendment, retains the existing 35 districts as the basis of the representative system, and as I think Dr. Dolan explained, it then takes only those districts which exceed 15,000 in population and awards to those districts alone additional representatives when the population reaches a second or third or fourth 15,000 population or a major fraction of that.

Now, what this means in the House of Representatives of Delaware is that in application as against the 1960 census of these districts, that instead of 35 districts 45 districts would exist. For the future there would be no limit on the size of the House but it would grow as the population

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increased. I think just a rough extension of population trends would indicate that by 1970 the House under this

plan would reach somewhere around, well, somewhat probably between 55 and 60 members. This is given a continuation of existing trends.

The bill, or the amendment, rather, changes the mathematical situation a little bit as a measurement of representativeness. For instance, New Castle County would have 25 of the 45 seats, which would give it I believe roughly 55 per cent of the House as against 41 per cent, I think, of the House under Article 2, Section 2.

The difference in the number of people that it would take living in the smallest districts, starting from the smallest and coming up, to control the House, as against Article 2, Section 2, where 18 per cent of the people living in the 18 smallest—or—yes, 18 per cent living the smallest districts control, it would raise that percentage to 28 per cent living in the 23 smallest districts, or roughly it would take 10 per cent more than now.

But still you are confronted with the fact that 70 per cent of the people live in one county of the three counties of the State.

This is also accompanied by some rather glaring disparities in the ratio of population to representation oc-

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casioned by the failure of 574 to combine the smaller districts up to the 15,000 mark, or even a major fraction of 15,000. So that you retain in New Castle County under this bill disparities on the order of 12 to 1, and, what is more, it would appear, again looking at population trends, and assuming even one small district on the order of 2,000 people, that this amendment would build into the Constitution some constant disparities on the order of 10 or 12 to 1.

Now, this is a disparity within New Castle County itself and is probably the place where the disparity would remain the greatest. But then in Kent County, where nothing was done at the present time under the terms of

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the bill, the 7 to 1 disparity remains, and the 4 to 1 or 4½ to 1 disparity remains in Sussex County, again in the case of districts that are adjoining.

Now, the other feature of this bill, the Senate section of the bill, I suppose it is salutory that this is to some degree increased representation. But this to me at least is offset by the decrease of representation, the relative decrease of representation, in the Legislature afforded New Castle County by virtue of adding two Senators each to Kent and Sussex to districts that overlap existing Senatorial districts, and they are based on representative districts, but of course they overlap Senatorial districts as well.

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Now, this situation means that the extent of the gross disparity, the 17 to 1 total disparity, remains in the Senate; this is unchanged because all of the existing Senatorial districts are retained and only four new super-districts are added.

Under Article 2, Section 2, it took eight districts to control, and these eight districts contained 22 per cent of the population. Now, under 574, the amendment, it will of course take 12 districts to control. But it is interesting, I think, to observe that these 12 districts actually include the territory that was in the old nine districts because three of the new super-districts overlap the old nine—or overlap enough of the old nine districts that these same nine districts instead of electing nine Senators will elect twelve Senators. In other words, they will still elect a—well, they will elect under 574 an even safer majority of the Senate than under Article 2, Section 2.

Now, this is again combined with the existing disparities between one Senatorial district and another. Like Article 2, Section 2, the apportionment of Senators is made to districts, as I read the law, and not to counties other than the fact that there will be a certain number of the

districts in the counties. But the districts are created first in the amendment.

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And so far as I can tell there is no basis certainly spelled out in the Constitution or in 574 giving any basis that one can observe for putting these districts where they are placed. Retaining the old section of the Constitution, the old paragraph of the Constitution which described the metes and bounds of these districts, which again had no basis that one could observe, to tell you whether population was to have been the original factor, or whether area was to have been the original factor, or whether a formula combining these, or something else, there just isn't anything there that tells you why it was done this way. I consequently cannot explain why this arrangement existed in the first place, or why it exists now.

This provision of 574 increasing the size of the Senate and awarding two additional Senators each to Kent and Sussex would appear to be just a means of offsetting the increase that New Castle got in the House.

Q. As a result of this additional four Senators down in the lower two counties, Doctor, are you able to calculate the representation as it now exists in the three counties, the percentage?

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The Witness: The old law. I am sorry.

A. (Continuing) Under the old law, well, the same percentage of the population will control the Senate under the new provision as under the old provision, the same percentage of the population.

As far as the total representativeness of the Legislature is concerned the situation would move, this would move Delaware I think on the scale I mentioned a while ago from 48th up to about 44th.

By Mr. Theisen:

Q. 44th of the 50 in the Union?

A. Yes. This takes into account in looking at the scale the changes that have been made in apportionment of the Georgia Legislature and the Maryland Legislature.

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By Mr. Theisen:

Q. Doctor, I gather from your testimony of majority rule that you would predicate representation in a state legislature upon population primarily, would you not?

A. Yes. I think population, as I said yesterday, is the overriding criterion. Mathematical exactitude is not a practical possibility. The objective, I think, should be to get as close to population as can be obtained so that the legislature is a fairly faithful reflection of the population that it is to represent.

Q. And is this limited to the House alone, or is it also the Senate of a state assembly?

A. I think it must be extended to both branches of a bicameral state legislature. The reason for this is that in a state as contrasted with the post hoc theory of the Federal Union which resulted from a compromise, the theory of Federal representation came after the fact rather than before it, but

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the representation in both the House and Senate in a state legislature relates directly to the people of the state.

In other words, the representative right of the citizen is cut in half, or his legislative power is cut in half; half of it goes to one House, and half of it goes to the other House of the legislature, and if a majority of the population is by an apportionment system, or some other device, prevented from even having the opportunity to control both

Houses of the legislature, I think then that that House has gone beyond what I would describe as meeting with some fairly basic assumptions about representative government.

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By Mr. Theisen:

Q. Dr. Hanson, having expounded on the basic purposes of a representative government and the functions of a representative legislature do you find any relation at all between those basic purposes and the amendment to House Bill 574?

A. I do not. 574 creates a situation which perpetually gives to the two lower counties of Delaware control of the State Senate whatever their population might be, and not only control, but two-thirds control. If their population—if existing trends would continue and their population by the next census instead of being 30 per cent is 20 per cent, they would still have two-thirds, and if by the next census it is 10 per cent they would still have two-thirds.

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By Mr. Theisen:

Q. Dr. Hanson, there has been some discussion while Dr. Dolan was on the stand and I suppose we will hear it again: Would you as a political scientist or as a student of government care to comment on the question of whether one finds any Federal analogy whatsoever in state representative government?

A. I can find none. I mean I find none at all. It seems to me that the Federal analogy just can't be applied

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to the states from the basis of legal or constitutional reasoning. I don't think it can be applied to the states from the aspect of historical perspective, and certainly it can't

be applied to the states from the point of logic dealing with the way in which a state is composed. The Federal analogy is interesting mainly because of the manner in which it has flowered in state government. It is interesting to note that at the time the Constitution was written in 1787 the Congress under the Articles of Confederation passed a northwest ordinance providing for proportionate representation. As early as 1635 Massachusetts had anticipated by two hundred years the Reform Act in Great Britain by placing a representation in its legislature on a population basis. A number of the states at the time the Union was formed did use population as the basis in both Houses or like Delaware were in a situation where the ostensible use of another factor did not matter, because population was quite similar between the counties. Maryland was another case in which the deviation between the largest and smallest county did not occur at the time of the formation of the Union. In fact, one of the things that the study of the Advisory Commission on Inter-Governmental Relations points out is that the original Constitutions of 36 of the states used population alone or nearly alone with only one—with only one or several minor varia-

tions as the basis of representation in both Houses.

The use of the Federal analogy in state government began not with state government, but with the growth of cities, and it has been used as something on which to pin the under-representation of cities or urban areas, as is now the case, including the metropolitan suburbs, to pin the under-representation of these areas in the State Senate. I think that theorization about this comes after the fact. You do it and then you explain it by saying this is an application of Federal analogy.

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By Mr. Theisen:

Q. Dr. Hanson, right before the recess you were discussing as a political scientist the question of whether you

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found any Federal analogy in state representative government. I think you were in the middle of that answer, were you not?

A. Yes. Well, I said that I could find none. The Federal analogy as it is commonly used is largely I think an excuse for the over-representation of some and the under-representation of others. I think it does not take into account basic differences between a unitary state and a Federal Union of states. It does not take into account the resulting difference in the nature of the representative process in these two kinds of governmental organizations.

Aside from the legal and theoretical aspects of it, the practical side not only discriminates, but it is important, I think, to understand the considerable difference which exists between the constituency of a United States Senator even from a small state, or small in population, such as Oklahoma or Nevada or Arizona, in which there is vast territory sparsely settled—his constituency is still composed largely and in some cases in the majority of voters who come from urban or metropolitan areas within that state.

So even though there is a mathematical disproportion of representation in the United States Senate, the interests which tend to be represented offset it, and if you look at the effect of it as contrasted with the effect of the application of the Federal analogy to rural districts or to

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rural counties in a state, you get a much different kind of legislative behavior by and large from a United States

Senator from a rural, or so-called rural state, than from a State Senator from a rural county or a rural district.

Q. Then I assume you find no basis for the Federal analogy being applied to Delaware?

A. I could find none at all. The counties are apparently like counties in other states that are sub-divisions of the state. I think the very fact that in the stipulation of facts or the pre-trial statement that for every county power there is listed a state statute is a rather clear indication that the powers that the counties have in Delaware are not plenary powers; they come from the state. I can see no basis.

Moreover, aside from the absence of this kind of a basis, equality of representation among the counties in Delaware would result in just the thing that I think shouldn't occur in state government, and that is to create a situation in which a minority, and probably a diminishing minority, of the population will have a perpetual control of the legislature, or at least of one House of the legislature. This is to totally disregard population in one House. It creates a Senate whose basic constituency is almost unalterably opposed to the basic constituency of the House, and this carries the

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question of checks and balances I think to the point of being ridiculous.

The value, as I see it, of a bicameral legislature is that it affords a wider opportunity to represent the cross-currents that exist in the population, political cross-currents. When you use one House, you necessarily create an arbitrary system of districts of one kind or another and you are unable to bring together some of the communities of interest that it is possible to bring together by affording a wider constituency in a second House with a smaller number of people who run from broader constituencies. It slows down the legislative process, as Dr. Dolan pointed out,

sometimes too much, perhaps, but it has the effect, I think, the salutary effect of providing two channels of access for the population to the legislature.

* * *

(226)

CROSS-EXAMINATION.

By Mr. Bove:

* * *

(260)

Q. Now, do you still fail to see an analogy between House Bill 574 and the Federal plan?

A. Yes. May I explain why?

Q. Yes.

A. First of all, again the representative districts are created as the units to which the seats in the House are to be apportioned. The seats in the House are not apportioned to counties as such. There is nothing in 574, even assuming the validity of the analogy between the Federal Congress and the state legislature, there is nothing in 574 which says that each county shall be guaranteed one representative although the number are to be apportioned on the basis of population. This would be quite a different thing from 574.

Moreover, even though the effect of 574 is to place an equal number of Senatorial districts, either clear districts or super-districts, in each of the counties, again they are not elected from the county nor representatives of the county but representatives of the district within which they are elected, which is again considerably different from the practice in the Federal Senate or the practice in the states, the six states which employ the Federal analogy of one to a county or two or more to a county.

(309)

Mr. Bove: May it please the Court, at the pre-trial conference counsel for all of the defendants had sug-

gested to the Court that the Court perhaps make some analogy between this case and, if your Honor will recall, I mentioned a patent case where the issues are found and then a separate hearing is held on the matter of damages, and I had suggested to the Court, and the Court did reject it then, that a similar situation be made to exist here where the Court would render its opinion on the validity or invalidity of House Bill 574, or of any portion thereof, and that then counsel for both sides, in the light of that opinion, would have the opportunity to submit plans.

I would like to submit to the Court that we have had some thoughts and some assumptions, some of which were in conflict on the only plan submitted by either of the parties, and I am not clear yet on it and I am not sure that it squres with other constitutional provisions.

So that on behalf of all of the defendants, your Honor, I would like to make the same application now that we

(310)

made at the pre-trial conference when your Honors did not follow——

Judge Biggs: Well, now, let us see precisely what this is. You suggest that we decide the constitutionality, or lack of it, of the new constitutional provision?

Mr. Bove: Yes, sir.

Judge Biggs: And then we do what?

Mr. Bove: And that if your Honors conclude it is invalid or that some part of it is invalid, that your Honor furnish us some guides, and then give us an opportunity—by us I mean the parties—to come into the Court and to present various plans in the light of the guides furnished by the Court, if it is necessary for the Court to furnish guides.

Judge Biggs: And then counsel working together and/or separately— I take it working separately and together—would try to evolve a plan? Do you think that you would reach any substantial conclusion any more than the Governor's Commission did?

Mr. Bove: I don't think that the plaintiffs' attorney and the various attorneys for the defendants could get together if it was necessary to get together after the Court's opinion to formulate a plan, but I do think that counsel for the defendants in the light of any guides which the Court found it necessary to give us could get together and submit

(311)

some plans to this Court.

* * *

(328)

DR. JAMES K. POLLOCK

[*Professor of Political Science at the University of Michigan, called as a witness on behalf of the defendants, being duly sworn, testified as follows:*]

CROSS-EXAMINATION.

By The Court and Mr. Battaglia:

(376)

Q. The Court handed down a very tentative plan and asked that the experts examine it. Did you examine it?

A. I did, but I hesitate to pass any judgment on it, because of my lack of knowledge of the situation in Delaware. From the appearance of it it seems entirely logical to me.

By Judge Biggs:

Q. We would like to have you express your views without hesitancy, Doctor.

A. Yes.

By Judge Wright:

Q. While you are here, Doctor, do the best you can.

A. I don't have it in front of me at the moment. But it met the standard requirement for apportionment of the areas which you are doing. It looks as if the districts are substantially equal without too much deviation. There would in some cases be a few thousand, but this is unavoidable, and if you are assuming a population basis for this House, which is

(377)

the case, it looks to me to be an entirely satisfactory plan.

By Judge Layton:

Q. May I interrupt you? You say assuming population basis?

A. Yes.

Q. The experts for the other side, as you know, have testified that the predominant factor in democratic elections is that legislatures should be controlled or elected, rather, on a strictly population basis. That is, as near as possible on a population basis. Now, do you take that view?

A. I take that view for at least one House.

Q. For one House?

A. Yes, and I believe that if you are doing one House on population you should do it as strictly on the basis of population as possible, and it seems to me your plan does this.

* * *

(399)

Q. And if I were to show you Plaintiffs' Exhibit 5, which is a representation of the distribution of population per representative district, you would find this to be illogical according to your previous statement?

A. If the assumpiton is it is to be on population it certainly is. That is what I said in replying to the Judges' plan. You don't find that great spread or deviation.

By Judge Wright:

Q. Do I understand you do believe that it is important to have one branch of the legislature on population?

A. Yes, sir. I thought I said that earlier.

(400)

By Mr. Battaglia:

Q. And if I were to show you what is Plaintiffs' Exhibit 15 and were to ask you and did ask you do you find anything irrational——

A. The same thing.

(426)

By Mr. Battaglia:

Q. Doctor, didn't this impinge on the county sovereignty, combining two counties that you had out in Michigan?

A. Well, there is no such thing as county sovereignty. I don't know what you mean.

Q. Your statement is that there is no such animal as county sovereignty?

A. Why, the states under our Federal Constitution are supposed to be sovereign, as you define "sovereignty" in this country. Certainly not the counties, no.

Q. Thank you, sir.

A. Counties have a good deal of their own tradition and their own habits and their own authority, but they are not sovereign.

Q. Doctor, a few minutes ago you said that the three counties in Delaware apparently have a great deal of continuity. What did you mean by that term, sir?

A. Well, I happen to have been born in Pennsylvania and I happen to remember my history that Delaware has

been here a long time, and these counties, I believe, have not been changed, their boundaries, in that whole period. That is what I meant.

• • •

(485)

LEON DE VALINGER, JR.

[*State Archivisit of the State of Delaware, a witness for the Appellants, Defendants below, testified in part as follows:*]

CROSS-EXAMINATION.

By Mr. Theisen:

Q. Mr. De Valinger, I believe you said that you edited or rather worked with the first census figures of 1790?

A. Yes, sir.

Q. You are then faimliar with the populat on, are you not, of all three of the counties at that time?

A. I was familiar with those figures then, when I worked with them.

Q. Are you not now familiar with them?

A. No, I am not.

Q. Well, do you have a recollection as to whether they were pretty near equal in number?

A. At 1790 they were, approximately.

Q. Well, weren't they actually 18,000, 19,000, in that area, each of them?

A. In the 2,000 bracket.

Q. I beg your pardon?

A. I would say within 2,000 bracket.

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(486)

By Mr. Theisen:

Q. Mr. de Valinger, in the work "Delaware, the First State", which I am sure you are familiar with, the one edited by Mr. Reed——

A. Yes.

Q. On page 261 of that volume the census figures for 1790 for the three counties are as follows: New Castle, 19,686; Kent County, 18,920; Sussex County, 20,488; a total population of 59,094. Is that your recollection? Does that refresh your recollection, those figures?

A. That is the reason I said about 2,000.

Q. Are you familiar with the population figures of the three lower counties at the time, let's say, of independence?

A. No, I am not. I wouldn't want to rely on my memory for that.

Q. Well, does your memory serve you well enough to say that they were about equal in population at that time also?

A. Yes.

* * *

(487)

Q. May I take you back a few years prior to the Declaration of Independence and call your attention to the end of the seventeenth century and frame my question to the lower counties and ask you if you can recall and recite to the Court what the grievances were that led to the separation of the three lower counties from the proprietary Penn colonies?

A. May I read from this volume?

Q. Well, I am asking you first, Mr. de Valinger, as a historian, do you know what those grievances were?

A. Yes, I know what some of them were.

Q. Well, may I ask you if it wasn't a fact that one of the determining grievances for separation from Penn-

sylvania was the fact that this burgeoning Philadelphia metropolis was demanding more representation in the Assembly?

A. That is not my interpretation of it.

Q. May I read to you from Reed's book, page 260, and ask for your comments upon this. The author states, beginning on the bottom of page 260 and running over to 261:

> "Another obstacle to literal majority rule in Delaware government remains to be mentioned, the lack of representation according to population. This is true of

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> both Houses of the Legislature, and the reason for it is historical. In the Assembly set up by Penn which introduced representative government into Delaware, each county was allowed an equal number of members, and so it has remained ever since. When at the end of the seventeenth century the growing metropolis of Philadelphia demanded increased representation, the Delaware county seceded and set up a separate legislature in 1704."

Does that refresh your recollection as to one of the reasons, one of the compelling reasons, why they seceded and set up their government?

• • •

A. I will be glad to answer that and say that on April 12 of 1701 the Charter of Privileges was granted by proprietor Penn, and one of the privileges was that if there was a separation of the three lower counties from Pennsylvania, from the province of Pennsylvania, the upper counties might be allowed to expand their representation in their own Assembly,

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and the Delaware—or three lower county Assembly to be established at New Castle could determine their own representation. But this was not the cause of the separation; this was conditional on the fact if they did do that.

By Mr. Theisen:

Q. Was this one of the grievances that led to the separation.

A. It may have been one of the grievances.

Q. Now, then, at that time, and until 1776, the three lower colonies were, as I understand from the history and from your testimony, they remained as proprietary holdings of the Penn family, did they not?

A. They did.

Q. So they were not at that time, and had not been until that time, any sovereign power, had they?

A. It depends upon the definition of "sovereignty" in this instance.

Q. They were owned by Penn and his family, weren't they?

A. They were owned by them.

Q. And they were governed by the representatives—the top governing official was a direct representative of William Penn's family, was it not?

A. Yes, but there were breakdowns in the Penn system;

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for example, the whole quit rent system that they had imposed broke down, and there were other aspects of it.

Q. By the way, where was Thomas McKean from?

A. New Castle County.

Q. Where was George Read from?

A. New Castle County.

Q. So that the three lower counties were not represented in the Continental Congress by representatives from each of the three lower counties, were they?

A. Not at that particular time.

• • •

(580)

HOUSTON WILSON, ESQUIRE.

[A member of the Governor's Bipartison Reapportionment Committee and Chairman of its Subcommittee, a witness for the Appellants, Defendants below, testified in part as follows:]

Q. As I understand what you worked out in House Bill 574 was that you would keep the Senatorial districts in New

(581)

Castle County, you would add two in Kent, and two in Sussex, and you would add two in each of the lower counties by dividing the existing counties into districts, you took half of the—you took five districts from each county, did you not, or took ten districts, I am sorry, you gave five to each district in each county?

A. That is right, on an east-west division.

Q. Did you compute at any time the population either one of the four districts?

A. No.

Q. You did not give any consideration, did you,——

A. You want to know how that was done?

Q. No. I asked you a question. Did you give population any consideration in making that division?

A. None at all.

• • •

(598)

Q. Mr. Wilson, a portion of House Bill 574, and the last bit of it, the tail end of it, provides that notwithstanding the provisions of the bill about subdividing districts with 15,000 population or more, that for the purposes

(599)

of any Constitutional Convention that was called, the delegates—you remember this?

A. I am with you now.

Q. —the delegates should remain as they were under the Constitution of 1897 and should not be affected by the provisions of House Bill 574.

A. Yes.

Q. Now, I ask you, what was the discussion, if any? What was the intent of the committee in making that recommendation, if the committee made that recommendation?

A. Why, some of the committee from the lower part of the State expressed some fear as to whether or not the reapportionment of the House under our plan would automatically result in a reapportionment of the delegates to a Constitutional Convention that we were proposing to call. They wanted to make it exceedingly clear that it would not. And so in order to arrive at what I felt and which the committee felt was one of these historic compromises for which this nation is rather famous we spelled it out, that it would not affect the delegates' strength to a Constitutional Convention that we were proposing to have called.

* * *

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Request of Counsel for Appellants for establishment of guidelines by the Court in the event the apportionment provisions are held unconstitutional:

FRANK O'DONNELL, ESQUIRE

[*Attorney for the Department of Elections for New Castle County and the Clerk of Peace for New Castle County:*]

Judge Biggs: Let me ask you one question in connection with your objection. Assume this Court should find that the new amendment is unconstitutional in the light of

the 14th Amendment of the United States Constitution, what then would you conceive it would be the duty of the Court to do?

Mr. O'Donnell: I would now be stating my views, I have not consulted——

Judge Biggs: Give us your views.

Mr. O'Donnell: My views are that if the Court should find that to be unconstitutional, that the Court should issue a mandate requiring the State to be redistricted in accordance with certain criteria, the lines to be adopted by the legislature. I think the Court might properly in its order give a reasonable time for compliance with the Court's order. If the Court finds that the order is not complied with, then more drastic measures might be in order, but that is the basis of our objection, that this question is not before the Court.

* * *

(739)

Mr. O'Donnell: Yes. That is my idea of what we were referring to in Paragraph 13. I did not think and I still do not think that the fine lines of how the districts should be drawn is the function of the Court. I feel that and I thought then that you were ultimately giving a decision where you would give us the general guides that you thought were appropriate and not the fine lines on the map of where the districts should be.

Consequently we have not and did not prepare any testimony in opposition to the lines as laid down this afternoon.

(737)

JANUAR D. BOVE, JR.

[*Former Attorney General, Attorney for the State Election Commissioner, and the Department of Elections for Sussex County:*]

Mr. Bove: May it please the Court, your Honors will recall that at the pre-trial conference counsel for the defendants did raise the question of the Court's proceeding by analogy to a patent case where the Court finds either infringement or validity or both and then goes into a hearing on damages. We had suggested that if the Court found either Article 2 of Section 2 or House Bill 574 and also House Bill 3 unconstitutional in any respect, that the Court establish some guide lines on apportionment and then hold a hearing on the form of relief to which the plaintiffs would be entitled if the Court found unconstitutionality. The Court did at the pre-trial reject that suggestion.

During the course of these proceedings, if your

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Honors will recall, I renewed our application in that respect and your Honors reserved decision on it, as I understood it. Do I now understand that your Honors are denying that application?

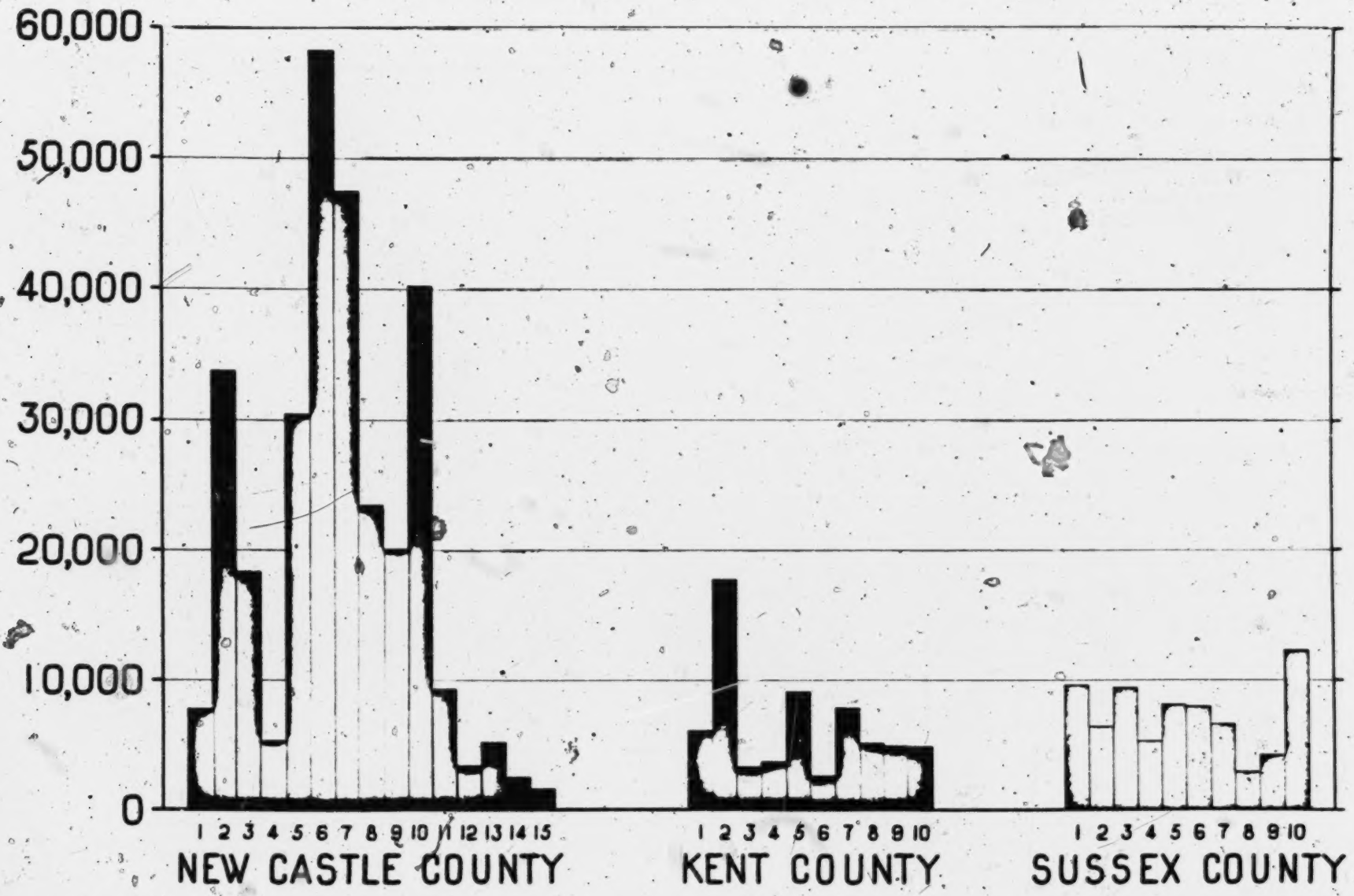
Judge Biggs: No. That was an oral application, was it not?

Mr. Bove: Yes, sir.

Judge Biggs: Mr. Bove, I would think it would be desirable, since the record has not yet been written, and at least I am not entirely clear as to what your motion was, if you presented it now or presented it during the course of the next 48 hours by way of a written motion.

Mr. Bove: Yes, your Honor.

1960 POPULATION OF DELAWARE
BY REPRESENTATIVE DISTRICTS

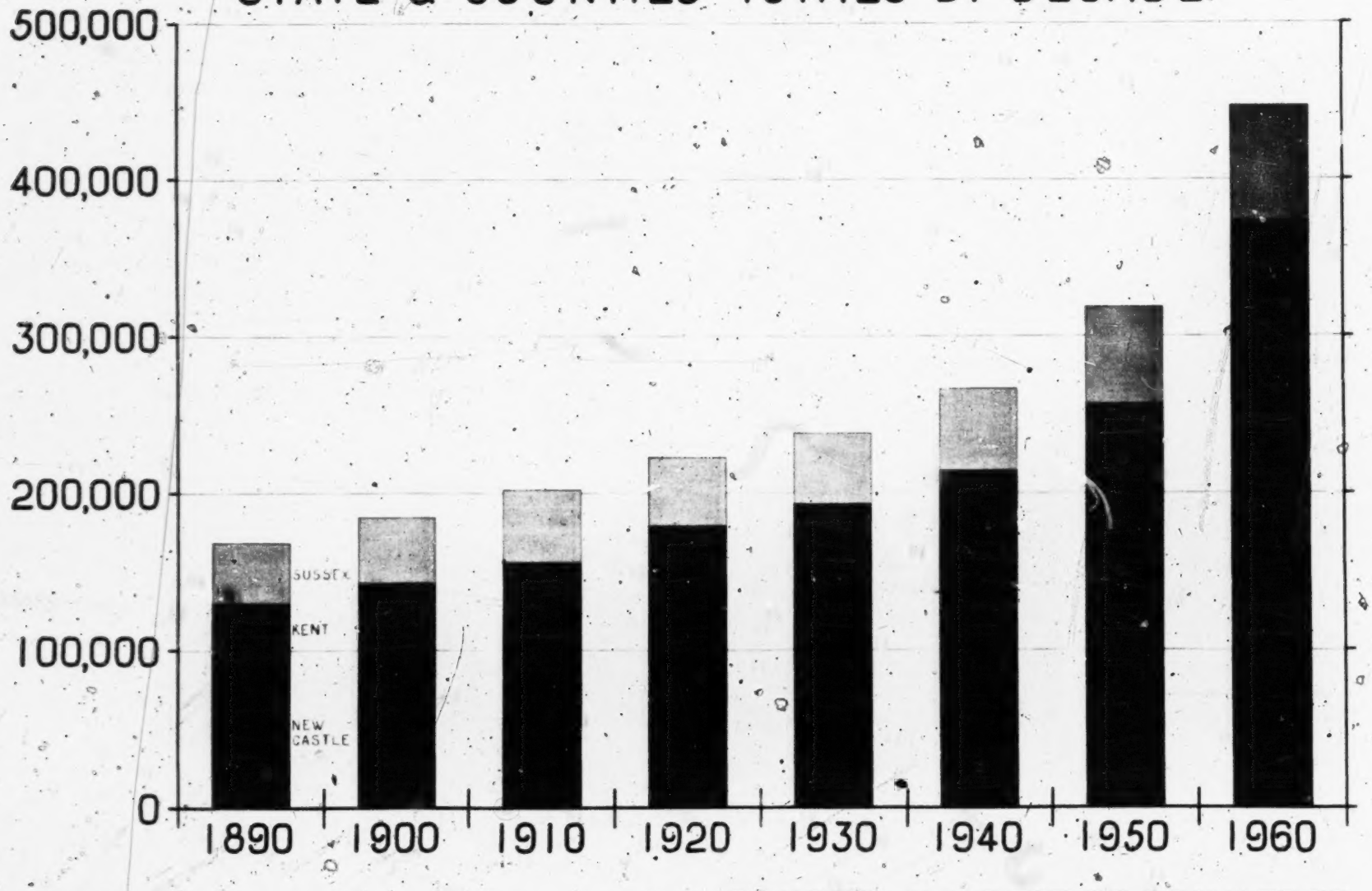


SOURCE: U.S. DEPT. OF COMMERCE
BUREAU OF THE CENSUS

POPULATION OF DELAWARE

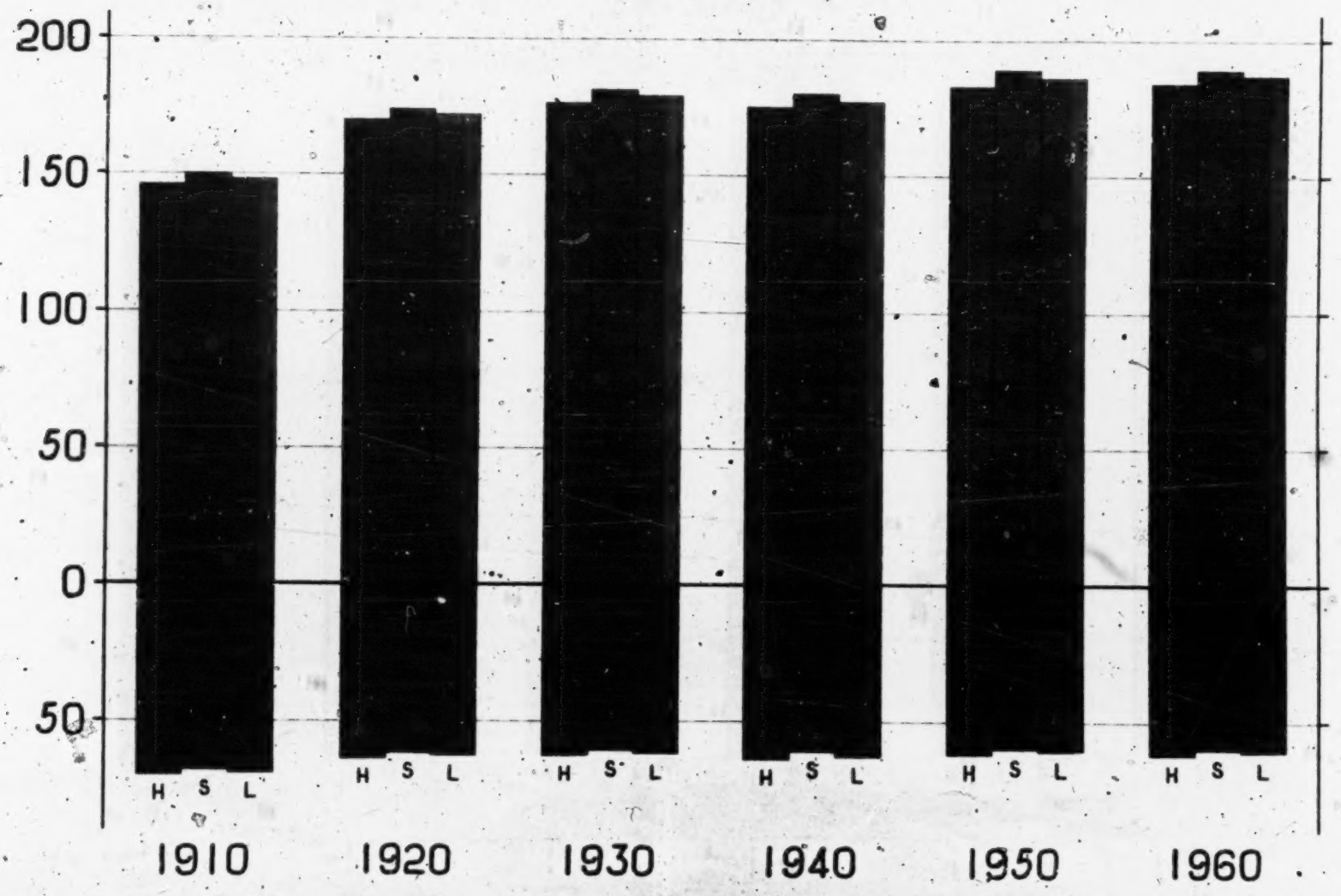
1890 THROUGH 1960

STATE & COUNTIES TOTALS BY DECADE



SOURCE: U.S. DEPT. OF COMMERCE
BUREAU OF THE CENSUS

AVERAGE VALUES OF THE VOTE FOR REPRESENTATION AS PERCENTAGES OF THE STATE-WIDE AVERAGE

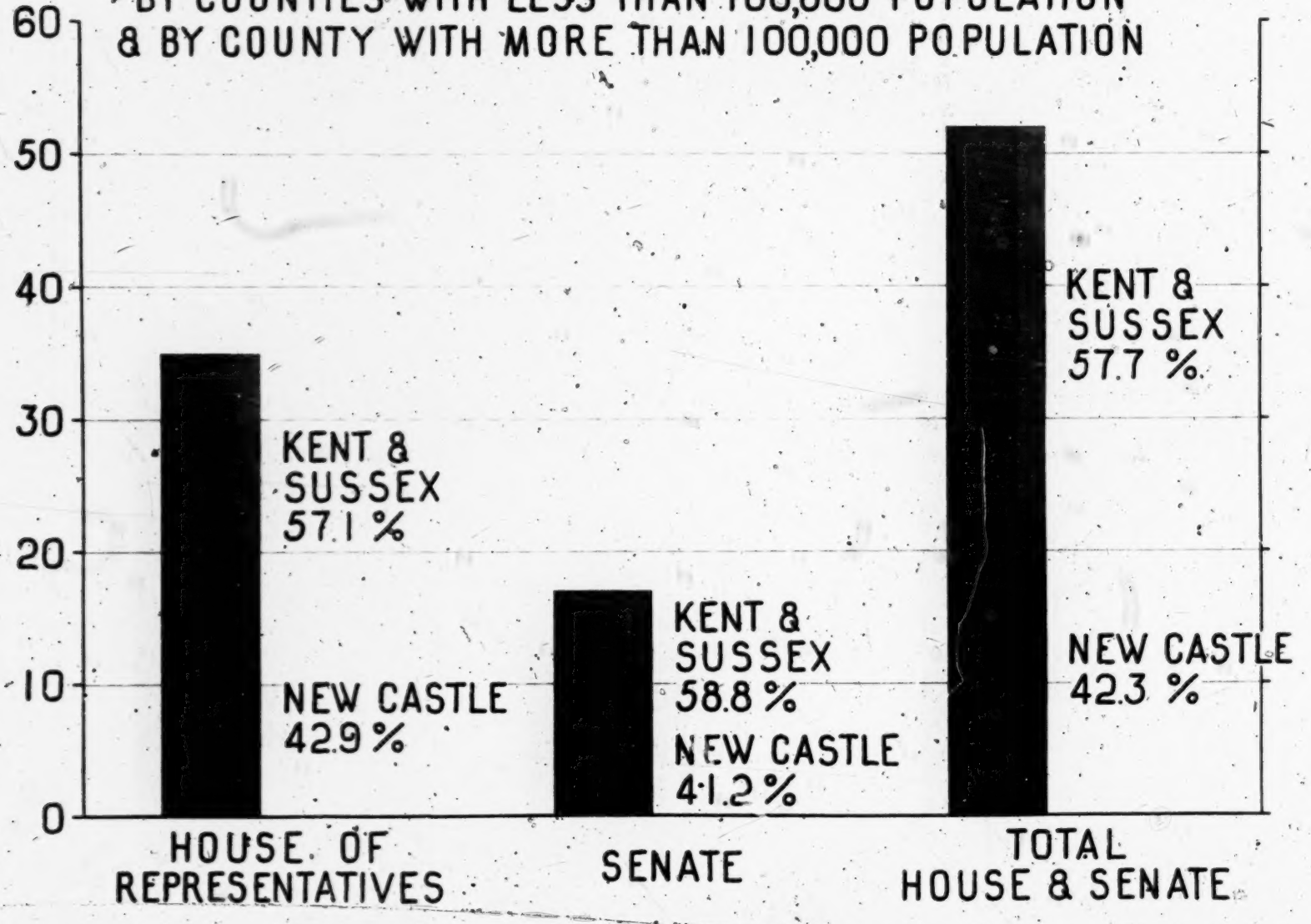


BY COUNTIES WITH LESS THAN 100,000 POPULATION
& BY COUNTIES WITH MORE THAN 100,000 POPULATION

SOURCE:
"DEVALUATION OF THE URBAN & SUBURBAN VOTE"
PAUL T. DAVID & RALPH EISENBERG

REPRESENTATION IN GENERAL ASSEMBLY OF DELAWARE

BY COUNTIES WITH LESS THAN 100,000 POPULATION
& BY COUNTY WITH MORE THAN 100,000 POPULATION

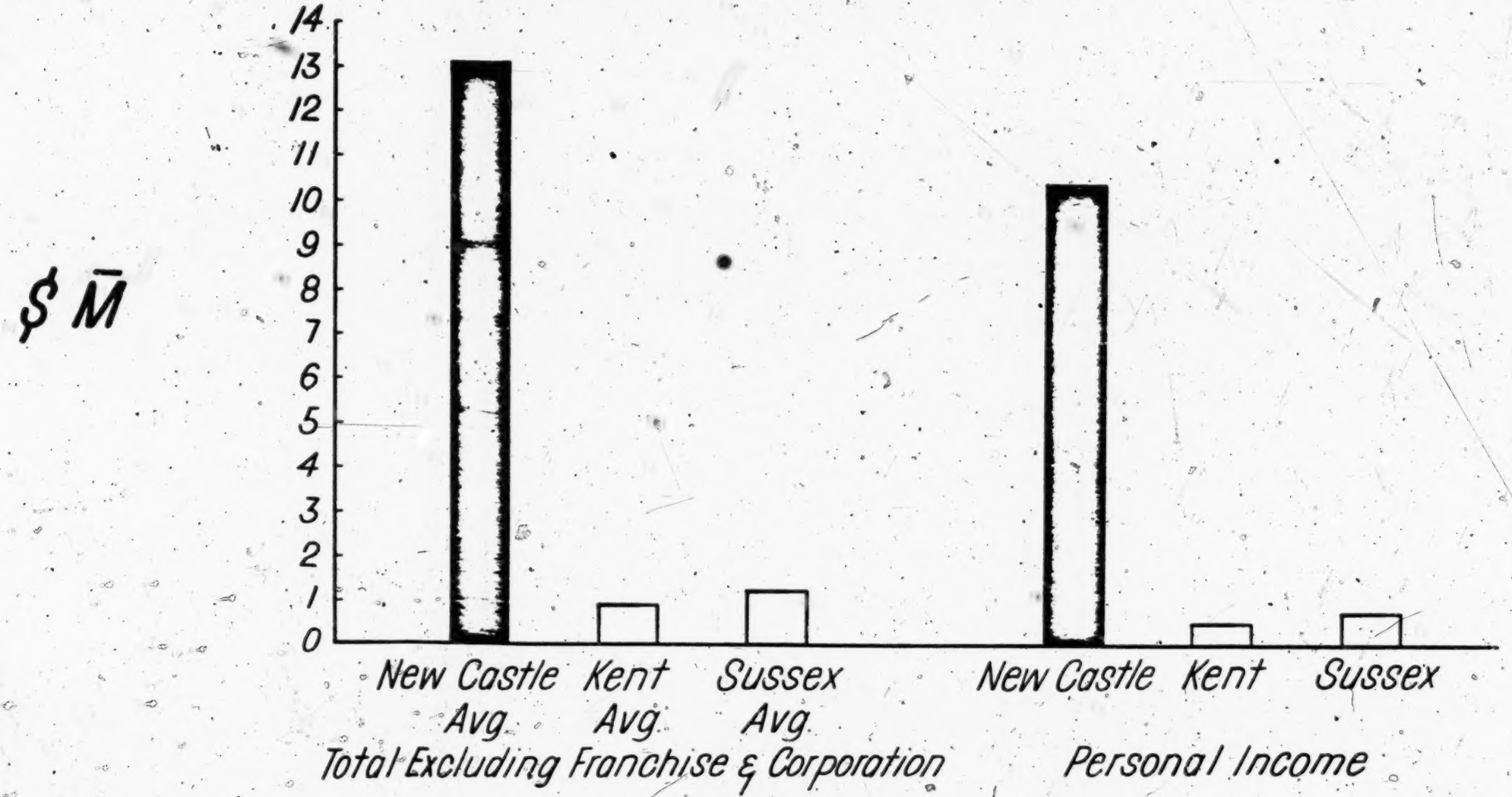


SOURCE: DELAWARE STATE CONSTITUTION

Plaintiffs' Exhibit, No. 3

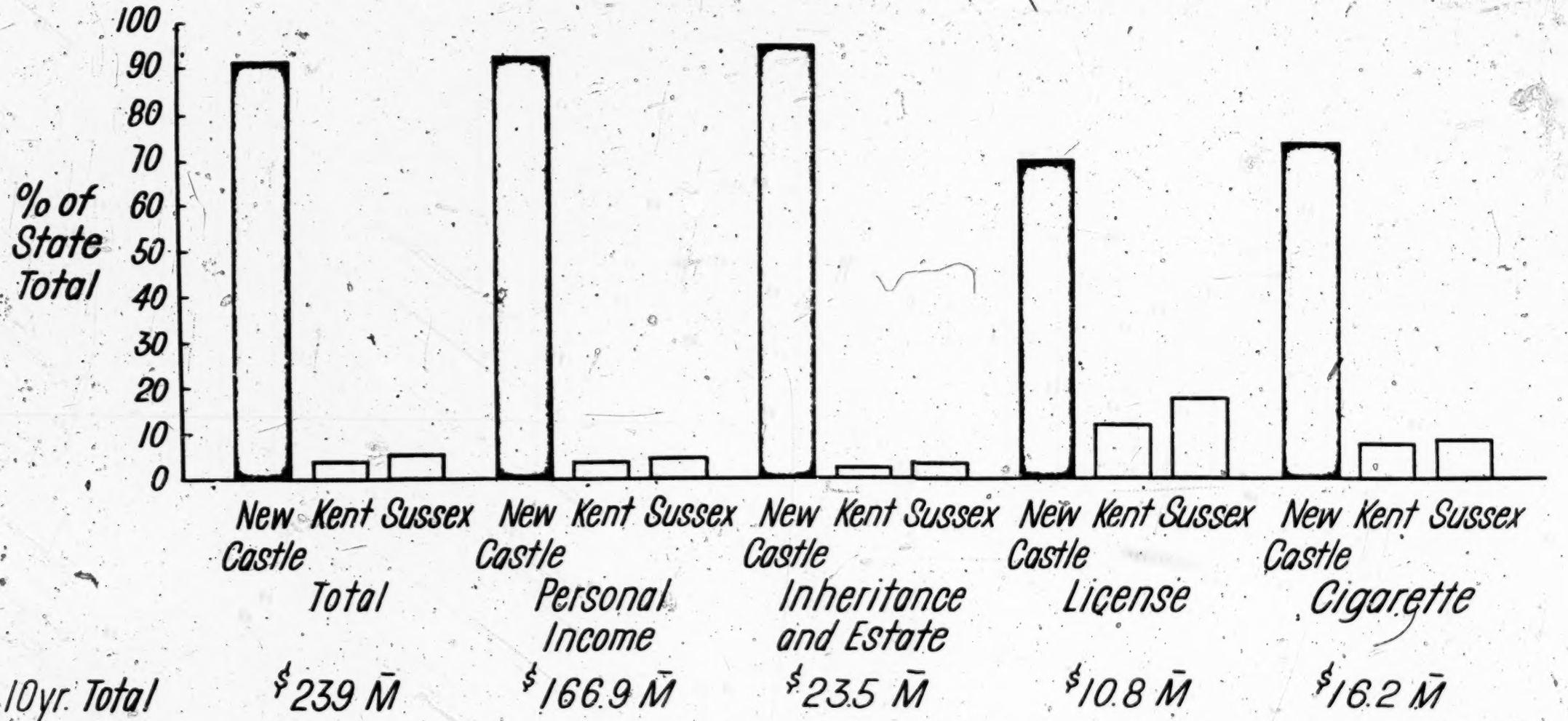
COLLECTIONS BY DELAWARE STATE TAX COMMISSION PER STATE REPRESENTATIVE

(BASED ON 10 YEAR TOTALS)

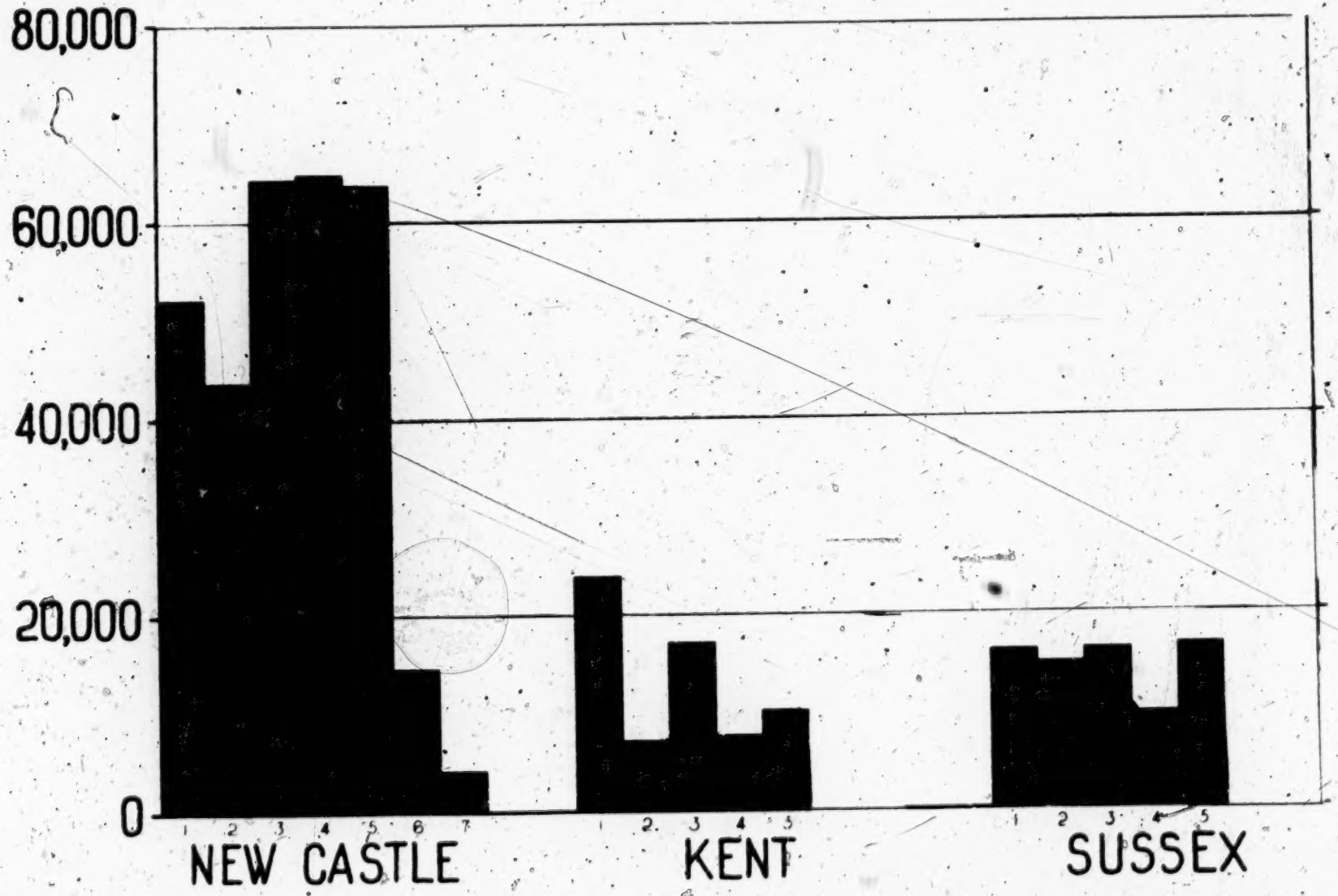


COLLECTIONS BY DELAWARE STATE TAX COMMISSION

1952 - 1961



POPULATION DELAWARE SENATORIAL DISTRICTS - 1960 CENSUS

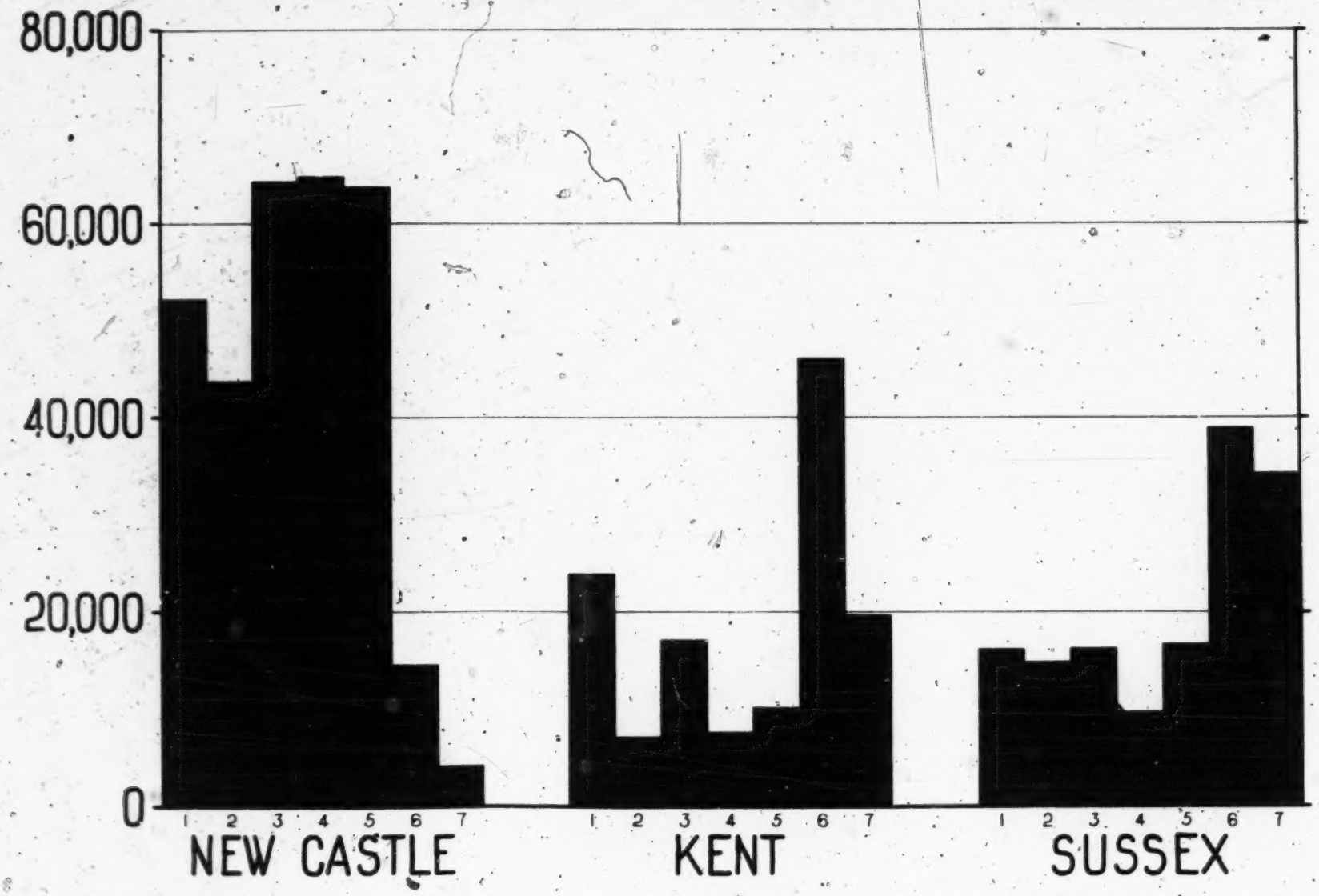


SOURCE 1960 CENSUS OF POPULATION BUREAU OF CENSUS

DELAWARE HOUSE OF REPRESENTATIVES
PROPOSED DISTRICTS BY POPULATION
H.B. 574 – 121 ST GENERAL ASSEMBLY

SOURCES: 1) HOUSE BILL 574.
2) 1960 CENSUS OF POPULATION BUREAU OF CENSUS

DELAWARE STATE SENATE
PROPOSED DISTRICTS BY POPULATION.
H.B. 574 - 121ST GENERAL ASSEMBLY



SOURCES: 1) COMM. OF 39-"REAPPORTIONMENT IN DELAWARE" 8/2/62
2) HOUSE BILL 574
3) 1960 CENSUS OF POPULATION BUREAU OF CENSUS

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No. 307

In the Supreme Court of the United States

October Term, [illegible]

MABEL V. BOMAN, CLERK OF THE PEACE FOR NEW CASTLE COUNTY, ET AL., APPELLANTS

v.

RICHARD SIMCOCK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ARCHIBALD COX,
Solicitor General,
BRUCE J. TERRIS,
Assistant to the Solicitor General,
RICHARD W. SCHMUDE,
Attorney,
Department of Justice, Washington, D.C., [illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 307

MABEL V. ROMAN, CLERK OF THE PEACE FOR NEW CASTLE COUNTY, ET AL., APPELLANTS

v.

RICHARD SINCOCK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the district court (R. 491–531) is reported at 215 F. Supp. 169. Prior opinions of the district court (R. 66–76, 214–217, 319–332) are reported at 207 F. Supp. 205 and 210 F. Supp. 395 and 396.

JURISDICTION

The judgment of the district court was entered on April 17, 1963 (R. 532–533). Notices of appeal to this Court were filed on May 28 and June 12, 1963, and probable jurisdiction was noted on October 21, 1963 (R. 541–545, 551–554). The jurisdiction of this Court rests upon 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether the provisions of the Delaware Constitution apportioning the Delaware legislature, which create serious disparities in per capita representation in both houses without any permissible or even rational justification and give control of the legislature to a small minority of the people, violate the equal protection clause of the Fourteenth Amendment.

2. Whether the decree of the district court enjoining further elections pursuant to the unconstitutional apportionment was an abuse of discretion.

INTEREST OF THE UNITED STATES

This is one of five reapportionment cases pending disposition in which the Court is called upon to formulate under the Fourteenth Amendment constitutional principles applicable to challenges to malapportionment of a State legislature. The Court has heard argument in the New York, Alabama, Maryland, and Virginia cases. The United States has filed its principal brief in *Maryland Committee for Fair Representation* v. *Tawes*, No. 29, in which we attempted to present a compendious analysis of principles which we deem applicable in the reapportionment field. The instant case raises specific problems in the application of those principles.

STATEMENT

1. *The Complaint.*—On June 5, 1962, the plaintiffs—seven citizens and taxpayers of the United States and the State of Delaware, who are residents and qualified voters of New Castle County, Delaware—filed a complaint in the United States District

Court for the District of Delaware, in their own behalf and on behalf of all persons similarly situated, challenging the apportionment of the Delaware legislature (R. 1–28). The defendants, who were sued in their representative capacities as officials charged with the performance of duties in connection with State elections, included the State Election Commissioner, the members of the Department of Election for each of the State's three counties, the members of the Board of Canvass of the three counties, and three Clerks of Peace (R. 5–7). The complaint alleged deprivation of rights under the equal protection clause of the Fourteenth Amendment, and asserted that the district court had jurisdiction under the Fourteenth Amendment, 42 U.S.C. 1983 and 1988, and 28 U.S.C. 1343 and 2201 (R. 3).

The complaint alleged that the apportionment of the Delaware legislature resulted in "invidious discrimination as to the inhabitants of New Castle County and the City of Wilmington" (R. 10–14). It alleged that the plaintiffs had the right "to cast votes [for legislators] that are of equal effect with that of every other citizen of the State of Delaware"; that the malapportionment of the legislature has operated to deny those rights to the plaintiffs; and that such malapportionment constituted "arbitrary and capricious state action which denies to petitioners a full vote in equality with other voters of the State of Delaware by reason of the failure to provide a reasonable classification of voters and members of the General Assembly," in violation of, *inter alia,* the equal

protection and due process clauses of the Fourteenth Amendment (R. 14–15).

Plaintiffs also alleged that they were without any other adequate remedy inasmuch as the legislative apportionment was "frozen" into the State constitution; that the legislature was dominated by representatives from the less populous counties; and that it was impossible to amend the constitution or to convene a constitutional convention for the purpose of reapportioning the General Assembly (R. 16). They asserted that the General Assembly "has prevented reapportionment by repeatedly failing to take appropriate restorative action" (R. 13–14).

Plaintiffs requested: (1) that a three-judge district court be convened under 28 U.S.C. 2281; (2) that the court enter a declaratory judgment that Article 2, Section 2 of the Delaware Constitution, which established the apportionment of the Delaware legislature, is unconstitutional under the Delaware Constitution, the Fourteenth Amendment, and the Civil Rights Act, 42 U.S.C. 1983; (3) that the court enjoin the defendants from conducting or engaging in any elections held pursuant to Article 2, Section 2 of the State Constitution; (4) that the court either apportion the Delaware legislature in accordance with the population of the State or direct that the general election of November 6, 1962, be conducted on an at-large basis; and (5) that the court retain jurisdiction for the entry of "such other and further relief as may be necessary and proper" (R. 17–18).

2. *The Pre-decision Proceedings in the District Court.*—A three-judge district court was convened

(R. 29–30). On July 25, 1962, the court entered an order staying the proceedings until August 7, 1962, "in the hope and expectation that some appropriate action [might] be taken by the 121st General Assembly" (R. 66–76, 77). 207 F. Supp. 205. The court noted that inasmuch as the Delaware Constitution required the Secretary of State to publish any proposed constitutional amendment in newspapers in each county at least three months prior to the succeeding general election (in this case, the general election of November 6, 1962), it would serve no useful purpose to grant a stay beyond August 7, 1962 (*ibid.*).

On July 30, 1962, the 121st General Assembly approved a proposed amendment (Del. H.B. 534) to Article 2, Section 2 of the Delaware Constitution (R. 275–277; Pl. Exs. 2 and 8). It could not, however, become effective unless adopted by the next session of the legislature.

On August 7, 1962, the district court held that the complaint properly alleged a cause of action within the jurisdiction of the court, and denied motions to dismiss (R. 214–217). 210 F. Supp. 395. The court noted that it had no desire to substitute its judgment for the collective wisdom of the Delaware General Assembly in matters of apportionment of the legislative, but that it had no alternative but to promptly proceed in the matter (*ibid.*). Some of the defendants applied for a further stay of proceedings so that the 122d General Assembly coming into office on January 8, 1963, would have an opportunity to agree to the proposed amendment (R. 219–220).

On August 8, 1962, the plaintiffs applied in the district court for a preliminary injunction in order to enjoin the conduct of the November 1962 general election "until the present discrimination against the Plaintiffs and all others similarly situated is corrected" (R. 224). Thereafter, the court permitted the plaintiffs to amend their complaint (1) to have the proposed constitutional amendment declared unconstitutional as violative of the Fourteenth Amendment and the Civil Rights Act, 42 U.S.C. 1983; and (2) to request an order provisionally reapportioning the Delaware legislature (R. 280–282, 316–318).

On October 16, 1962, the district court denied both the applications for a preliminary injunction and for a further stay (R. 319–332, 333). 210 F. Supp. 396. After extended pretrial proceedings, the court, on November 27, 1962, entered a pretrial order in which the parties agreed to the accuracy of a series of exhibits, statistics, statistical computations, and the like (R. 368–400).

In early January 1963, the 122d General Assembly approved the proposed constitutional amendment (Del. H.B. 574) by the requisite two-thirds vote. As a result, the amendment to Article 2, Section 2 became effective on January 17, 1963.

3. *The Evidence.* a. *The apportionment before the 1963 constitutional amendment.*—At the time of the adoption of the Constitution of 1897, Kent County, Sussex County, and "rural" New Castle County (*i.e.*, the area outside Wilmington) were each apportioned 10 representatives and 5 senators (R. 377). The City of Wilmington, which had considerably more popu-

lation than any one of the rural areas, was given 5 representatives and 2 senators (R. 377). The 35 representative districts generally followed the boundaries of a "hundred," a geographical subdivision of a county in Delaware since its founding.[1] Many of the representative districts coincided with a particular hundred; others consisted of a portion of a hundred, or of a hundred and a portion of another hundred, or of two or more hundreds or portions of hundreds. Wilmington City (apparently within the bounds of the ancient Wilmington Hundred) was divided into 5 representative districts (Court Ex. 2, pp. 57–58; Pl. Ex. 23). The 17 senatorial districts, which were likewise specified in the Constitution, were composed either of two representative districts each (the situation applicable to Kent and Sussex Counties), or of two or more hundreds or portions of hundreds (the 3d, 4th, 5th, 6th and 7th districts of New Castle County), or of portions of Wilmington City (the 1st and 2d districts of New Castle County).

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[1] In early England, "hundreds" were subdivisions of counties or shires based upon the number of families of freeholders residing there. Each hundred consisted of ten towns or tithings, and each town or tithing consisted of ten families of freeholders. Each county or shire was composed of an indefinite number of hundreds. 1 Blackstone, *Commentaries*, pp. 114–116.

Hundreds were used as geographic subdivisions in the early days of the colonies of Virginia, Maryland and Pennsylvania. In Delaware, the hundreds are simply ancient subdivisions of the counties established under the authority of William Penn (R. 1019–1020; Court Ex. 2, p. 58). There are 11 hundreds in New Castle County, including Wilmington Hundred, which is coterminis with the City of Wilmington; 9 hundreds in Kent County; and 13 hundreds in Sussex County.

The evidence showed that in the six years prior to the institution of this case, about 7 bills providing for reapportionment of the legislature or for calling a constitutional convention for that purpose were introduced in the General Assembly but were either not reported out of committee or else failed to pass (R. 51–57, 60–65, 271–274, 389; Pl. Exs. 6, 7, 8, and 9).

b. *The apportionment after the 1963 constitutional amendment.*—The amendment to Article 2, Section 2 of the Delaware Constitution, which became effective on January 17, 1963, increased the size of the Senate from 17 to 21 members and allotted the 4 additional senators equally to Sussex and Kent Counties, thereby giving each of the three counties 7 senators (R. 385; Pl. Ex. 8). The sixth senator for Kent County was to be elected at large from the first, second, fifth, seventh, and eighth representative districts of that county; and the seventh senator for Kent County was to be elected at large from the third, fourth, sixth, ninth, and tenth representative districts (*ibid.*). The sixth senator for Sussex County was to be elected at large from the first through the fifth representative districts of that county, and the seventh senator was to be elected at large from the sixth through tenth representative districts of that country (*ibid.*). As a result, each voter in Kent and Sussex County would have been entitled to vote for one representative and two senators.

As for the House of Representatives, the amendment provided that each representative district with a population in excess of 15,000 persons was to be alloted an additional representative for each additional 15,000 persons or major fraction thereof (R. 384;

Pl. Ex. 8). The boundaries of the original 35 representative districts were not affected.[2] The net effect of the amendment in terms of immediate representation in the House would have been to allot an additional 10 representatives to various districts in New Castle County, increasing the size of the House to 45 members (R. 384).[3] The representation of Kent and Sussex Counties would not have been affected.

The populations of each senatorial and representative district, both before and after the 1963 amendment, are set forth in the opinion of the court (R. 496–497, 499, 503–505).

The constitutional amendment also provided that in in the event that a constitutional convention was con-

[2] Districts receiving additional representatives were to be divided so that each of the new districts would elect one representative. The new districts were to be "as nearly equal in population as possible to the other new districts being created" from the same representative district.

The actual reapportionment of representatives and redistricting of the districts was to be performed by a Redistricting Commission consisting of the Governor and the state chairmen of the two political parties receiving the largest vote for governor at the preceding gubernatorial election as advisors to the Governor. The reapportionment and redistricting was to be completed by the Commission within 120 days following the official reporting to the President of the United States of each decennial census. In the event that the Commission failed to act within the 120 days, any qualified voter, within the following 30 days, might, by mandamus or otherwise, compel the Governor to reapportion and redistrict the House of Representatives. These provisions, however, relate solely to the reapportionment and redistricting within the existing 35 representative districts.

[3] The 10 additional representatives would have been alloted as follows: one each to Districts 2, 5, and 8; two each to Districts 7 and 10, and three to District 6 (R. 384, 503).

vened, as provided for in Article 16, Section 2 of the Constitution, the number of delegates and their method of election was not to be affected by the addition of representatives as a result of the amendment. For the purpose of any future constitutional convention, the representative districts were to elect delegates on the basis of the apportionment provided by Article 2, Section 2 as it existed prior to the amendment (R. 387; Pl. Ex. 8). Article 16, Section 2 provides that the General Assembly, by a two-thirds vote, may submit to the voters at the next general election the question whether a constitutional convention to revise and amend the constitution shall be convened, and, if a majority of the people voting at the election approve, the General Assembly must convene the convention. The number of delegates would continue to be 41, one from each of the original 35 representative districts and 2 elected at large from each of the three counties.[4]

4. *The decision and decree of the district court.*— On April 17, 1963, the district court, in an opinion by Circuit Judge Biggs, held that Article 2, Section 2 of the Delaware Constitution, as it existed prior to the 1963 amendment as well as after the amendment, resulted in gross and invidious discrimination against the plaintiffs and others similarly situated, in violation of the equal protection clause of the Fourteenth Amendment. The court could find no rational or reasonable basis for the apportionment under Article 2, Section 2, either before or after the amendment. 215

[4] In addition to other witnesses, three political scientists testified at length at the trial concerning proper methods of apportionment (R. 591–706, 709–886, 890–918, 927–1010, 1166–1295).

F. Supp. at 184–189. The court concluded that the matter of reapportionment was basically a legislative function, and that a further opportunity should be given to the General Assembly properly to reapportion itself in accordance with the Fourteenth Amendment. In this regard, the court noted that minimal constitutional standards required that at least one house of the Delaware General Assembly be apportioned on an "equal population basis" with the overriding aim of "one vote, one person"; and that, with one house so apportioned, other cogent and relevant factors (*i.e.*, history, geography, custom) might be given some weight along with population in apportioning the other house. 215 F. Supp. at 189–191. However, the weight given to such factors "should not be thought of as necessarily destroying the foundation principle of majority rule, or effecting invidious discrimination or irrationality in apportionment." *Id.* at 191. Due to the closeness of the 1964 general election, the court gave the General Assembly until October 1, 1963, to enact a reapportionment statute.

Chief District Judge Wright concurred that Article II, Section 2 of the Delaware Constitution, before as well as after amendment, was unconstitutional, and that at least one house of a State legislature must be apportioned strictly on a population basis. He agreed with the "precatory observation" of Judge Biggs that the upper house must also be based "substantially upon population * * * so long as the majority principle is adhered to." 215 F. Supp. at 195.

District Judge Layton concurred in that portion of the opinion holding Article 2, Section 2 of the Con-

stitution, prior to as well as after the 1963 amendment, unconstitutional as applied to the House of Representatives. Judge Layton pointed out that, since the 1963 amendment did not contain a severability provision, the whole amendment was unconstitutional because of the House provisions and, therefore, no need existed to consider whether the Senate provisions were constitutional. Judge Layton said that it was constitutionally permissible for a State to pattern one house upon an equal area basis where the other house was apportioned upon a "strict population basis" inasmuch as such a system would be patterned upon the Federal Congress. *Id.* at 196–197.

A decree was entered declaring Article 2, Section 2 of the Delaware Constitution to be unconstitutional (R. 536–537). The court reserved jurisdiction to order injunctive or other relief if this appeared necessary. On May 20, 1963, the court enjoined the defendants from conducting any special or primary election, or the general election of November 1964, for the General Assembly under the apportionment provisions of Article 2, Section 2 of the Delaware Constitution as they existed prior to or after the 1963 constitutional amendment. The court again reserved jurisdiction to make such further orders as it might deem necessary (R. 540). The decree does not embody any of the "precatory observations" about the apportionment to be made by the Delaware legislature.

The defendants thereafter filed notices of appeal to this Court. On June 27, 1963, Mr. Justice Brennan stayed the district court's injunction pending dispo-

sition of the case by this Court. Probable jurisdiction was noted on October 21, 1963.

ARGUMENT

INTRODUCTION AND SUMMARY

This is by far the easiest of the reapportionment cases now before the Court on the merits. The apportionment of the Delaware legislature plainly violates any standard of equal protection. Appellants' elaborate argument that a State may model representation in its legislature after the federal analogy is totally irrelevant. The Delaware legislature is constituted upon a radically different basis from the federal Congress, and the apportionment results in gross discrimination that the federal system has never created.[5] Nor is the question raised by the decree

[5] For convenience we list here some of the reasons, discussed in the Argument, showing why this case raises no questions of the constitutionality of a State apportionment of seats in a bicameral legislature analogous to the Congress of the United States:

1. The Delaware House of Representatives is not apportioned in accordance with population. The federal House of Representatives is so apportioned, subject to the very minor qualification that each State is assured one representative. This basic contrast is evident from the fact that a majority of the representatives in Delaware's lower house come from districts containing only 28 percent of the population—less than one-third—whereas it takes, under the constitutional apportionment of Congress, almost half the people to elect a majority of the United States House of Representatives.

2. The Delaware Senators are not chosen as representatives of the counties. The 21 Senators are chosen one each from 21 districts established solely for the purpose of their election. Each Senator represents his district, not the county. The only point of resemblance to the United States Senate is that the

of the district court, which merely adjudicates the unconstitutionality of the present apportionment.

In our briefs and arguments in the previous apportionment cases, we have submitted and sought to justify four basic principles by which the unconstitutionality of a State's apportionment should be determined. There is no occasion to repeat the argument here. In this brief we content ourselves with showing how the four principles apply to this case, supplementing the basic analysis only where necessary to deal with questions brought out in oral argument and inadequately covered in our prior briefs.

The starting point, we argued, should be the arithmetical comparison of the representation accorded qualified voters *per capita*. We discuss the proposition here only to the extent necessary to show that the comparisons of *per capita* representation are a proper measure of the political equality guaranteed by the equal protection clause of the Fourteenth Amendment.

We then turn to the second proposition—that an apportionment which creates gross inequalities in *per capita* representation without any intelligible foundation violates the Fourteenth Amendment—and show that the Delaware apportionment, not as an imaginary "federal plan" but as it actually exists, creates that form of unconstitutional discrimination.

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legislature, in an effort to create an analogy, created the same number of districts in each county.

3. There is no rational basis for the apportionment of seats in either house of the Delaware legislature. The apportionment of seats in each branch of Congress is based upon a coherent political philosophy.

Since counsel suggest no rationalization of the idiosyncrasies that permeate the apportionment of both houses of the Delaware legislature and none are apparent, it may be superfluous to go further; but out of an abundance of caution we submit that any criteria of differentiation offered by way of explanation would be insufficient to justify the discrimination unless relevant to the permissible purposes of legislative apportionment. The critical distinction, which we elaborate below, is between (a) rules serving the purpose of making representative government work better, the operation of which may have the collateral consequence of creating *per capita* inequalities in representation, and (b) rules whose only function is to create classes of voters with preferred political rights giving them voting power disproportionate to their number. Whatever may be true in the first case, the discrimination is unconstitutional in the second.

Finally, we show that the Delaware apportionment violates the equal protection clause because, apart from all else, it creates inequalities in *per capita* representation and submerges the principle of majority rule to a degree so utterly disproportionate to any permissible purposes accomplished as to be arbitrary and capricious. In the Senate there are inequalities in the treatment of voters in different districts within the same county that run as high as 15 to 1. In the House of Representatives there is "one disparity as high as 12 to 1, several at 11 to 1, 10 to 1, and 9 to 1, [and] many at 8 to 1" (R. 510). A numerical majority of the House comes from districts containing only 28 percent of the people. A majority of the

Senate comes from districts containing less than 20 percent of the people. The discrimination runs in the same direction in both houses of the legislature.

I

IN DETERMINING WHETHER AN APPORTIONMENT OF LEGISLATIVE REPRESENTATIVES VIOLATES THE EQUAL PROTECTION CLAUSE, THE BASIC STANDARD OF COMPARISON IS THE REPRESENTATION ACCORDED QUALIFIED VOTERS PER CAPITA

"The Constitution in enjoining the equal protection of the laws upon States precludes irrational discrimination as between persons or groups of persons in the incidence of a law." *Goesaert* v. *Cleary*, 335 U.S. 464, 466. *Baker* v. *Carr*, 369 U.S. 186, 226, shows that this principle is applicable to the apportionment of representation in a State legislature.

To show inequalities in representation, the complainants in the several reapportionment cases, like ourselves, have made many statistical comparisons of the *per capita* representation of the voters of the districts from which representatives were elected. A member of the Court suggested, however, that the resulting ratios were merely sixth grade arithmetic, perhaps lacking relevance to the issues at bar. The comment doubtless was intended to raise the fundamental inquiry, whether the equal protection clause is concerned with uniform apportionment *per capita* or with some broader concept of equal representation. If the latter, do figures showing the *per capita* representation afforded voters in different geographical districts truly reflect the equality or inequality of repre-

sentation, or must the focus be widened to encompass other aspects of State government before one can determine whether the particular governmental system denies some voters equal protection of the law?

Our answer is that State action which gives rise to hostile or capricious discrimination in the *per capita* apportionment of representatives is so related to unequal representation in the larger sense as to violate the constitutional guarantee of equal protection of the law, however fairly other aspects of the State government have been constructed.

Deciding whether an unreasonably discriminatory apportionment of representatives violates equal protection is a more specific task than establishing an ideal form of representative government. One attempting to establish an ideal "representative government" would face, at the threshold, the task of defining "representativeness." Even if it were agreed that a perfectly representative legislature would be a microcosm of the whole people, reproduced in exact proportions, it would still be apparent that the allocation of representatives in exact proportion to the population of the several districts would not alone ensure the objective. Where party loyalties are strong or few issues divide the electorate, skillful gerrymandering of the district lines may enable a minority of the people to elect a majority of the legislature. Even without gerrymandering, a population that was divided 60–40 on a critical issue might conceivably choose a legislature having a unanimous view, because the vote could divide 60–40 in every district.

Thus, the political scientist planning Utopia or the statesman organizing a new framework of government must concern himself with such questions as where the district lines will be drawn, with "wasted votes," and with whether and how to make the legislature reflect the divisions and intensity of opinion within the individual districts. Sundry plans of proportional representation and other devices have been directed at those ends. Nothing we have argued casts doubt upon their constitutionality. Whether the Fourteenth Amendment reaches such questions is not in issue. Any inability to guarantee "equal representation" in the largest sense would be no better reason for upholding an arbitrary classification in apportionment than is the inability to offset all the disadvantages from which the outcast pauper suffers at a criminal trial a reason for withholding from him the transcript necessary for appeal that the rich can purchase. Cf. *Griffin* v. *Illinois*, 351 U.S. 12.

But if the apportionment of representatives among geographical districts in direct ratio to their population is not enough to guarantee "fair representation" in the broadest sense, arbitrary and capricious discrimination in per capita representation will almost always defeat "equality" in any sense of the word. The arithmetical comparisons undeniably measure the comparative influence that the ballot of each voter in different districts can have on the composition of the legislature, and thus on the course of legislation. If one starts with gross and capricious discrimination at that point, it is virtually certain that the inequality will persist. The diversions, dilutions, distortions, and cross-currents that are felt before the votes cast

for representatives are reflected in action on the floor of the legislature, would rarely, if ever, rectify gross inequalities in the ratio of seats to population. No one, to the best of our knowledge, has ever attempted to show that the apparently capricious apportionment of seats in a State like Delaware is intended to offset other inequalities and so ultimately to produce equal representation. The most extraordinary combination of circumstances would be required. There is not the slightest reason to suppose that Delaware's *per capita* divergencies of 12 to 1, 9 to 1 and 8 to 1 as well as the many smaller discrepancies, all scattered as if by a throw of the dice, somehow mysteriously operate to cancel out a hidden gerrymander or other distortions of the *per capita* vote. It would be the wildest coincidence if the members of the Delaware House of Representatives from the grossly overrepresented District 8 in Sussex County, Districts 3, 4 and 6 of Kent County, and Districts 12, 14 and 15 of New Castle County accurately reflected the wishes of those whose candidates lost the elections in the grossly underrepresented districts. It is even less likely that the underrepresented voters of New Castle District 9 are being represented by the representative of an overrepresented district, such as 14 or 15. Even if that could be the fact, it would be no answer to the complaint. Those who raised the cry, "No taxation without representation" could not have been satisfied by an argument that they were being represented in the English Parliament by Edmund Burke and Charles James Fox.

The extent of the legislature's participation in the law-making process is also irrelevant. The equal protection clause does not require a representative legislature, but it does guarantee all voters against arbitrary discrimination in the incidence of any laws creating a legislature and apportioning its seats. Cf. *Griffin* v. *Illinois*, 351 U.S. 12. That the role of the legislature may be confined, or that it may be supplemented by the initiative and referendum, does not affect the problem. For it is no answer to the victims of arbitrary discrimination in respect to the influence of their votes upon the composition of the legislature to tell them that the role of their legislature is less important than in other States, or that there are special ways of making laws in which there is no denial of equal protection.

Since the right to be free from capricious discrimination based upon *no* policy is a personal right, it is immaterial whether the discrimination was adopted, or can be changed, by initiative and referendum or some other exercise of the popular will. The central purpose of the Fourteenth Amendment is to protect minorities. That principle, which is clear in other fields of constitutional law, is controlling here. A simple illustration is enough to put the point beyond dispute. If a State with 21 identical counties, each containing 60,000 voters, divided each of 20 counties into six equal districts, with each district to elect one representative, but allocated only one representative to the twenty-first county, for a total of 121 representatives, it would take representatives elected by 610,000 voters or 48 percent of the population to

elect a numerical majority of the legislature. The entire State, except the victims of the discrimination living in the underrepresented county, might favor the apportionment. Nevertheless, the capricious discrimination would violate the Fourteenth Amendment.

This is also true when the apportionment is attacked under our third basic proposition as an instance of systematic discrimination based upon criteria that are invidious or irrelevant to any of the permissible purposes of legislative apportionment. If the discrimination is based upon grounds condemned by the concept of equal protection, then it matters not that the victims suffer at the hands of a majority of the people.

On the other hand, the ease with which an apportionment can be changed by a majority of the people in a State may be relevant in applying the fourth of the proposed principles—that the equal protection clause is violated by an apportionment which subordinates the principle of popular representation to other permissible considerations to such a degree as to create gross inequalities in the representation of voters and give control of the legislature to small minorities of the people. Under this head the issue turns upon the reasonableness of the balance the State has struck between the interest in equality of representation and opposing objectives that we assume *arguendo* to be permissible objectives of legislative apportionment.[6] The balance depends upon the degree

[6] See Brief for the United States in *Maryland Committee for Fair Representation* v. *Tawes*, No. 29, this Term, pp. 24–25.

of inequality and submergence of the popular will. If the popular will can find expression in other outlets, such as the initiative and referendum, or if a majority of the people can readily correct the malapportionment, then the degree of minority control of the legislature is somewhat less important than would otherwise be the case. Such institutional arrangements may be relevant to the application of the fourth proposition, therefore, even though they have no bearing upon the others.[7]

While such questions must be answered in any comprehensive rationale, they are not raised in the present case. A majority of the people of Delaware are unable to reapportion the legislature by initiative and referendum or even a constitutional convention.[8] There are no other institutions by which the popular will may express itself in the enactment or repeal of legislation.

A statistical comparison of the *per capita* representation of the voters in the districts into which a State is divided, standing alone, is insufficient to prove violation of the Fourteenth Amendment. The arithmetic leaves open all of the legal questions. It is a

[7] The availability of methods of constitutional reform may also bear upon the propriety of equitable intervention, but no such question is presented here.

[8] The Delaware Constitution may be amended in only two ways: First, an amendment may be passed by a two-thirds vote in both houses of the legislature at two consecutive sessions. Art. 16, § 1. Second, the General Assembly may, by a two-thirds vote, submit to the voters the question whether to hold a constitutional convention. If a majority of voters approve, a convention must be called. Art. 16, § 2. Thus, the legislature has complete power to block any amendment of the constitution.

means of comparison, and for that purpose it is a useful, if not indispensable, tool. Be it easy or difficult, it measures exactly the extent to which the State has introduced a source of discrimination between persons and groups in the influence their *votes* may have on legislation through participation in the choice of representatives in the law-making body. While the process of measurement answers none of the legal issues, its simplicity should not be allowed to hide or denigrate the basic importance of what is being measured—equality or inequality of voting power in the selection of the composite legislature. For unequal voting power almost surely means unequal representation.

II

THE DELAWARE APPORTIONMENT CREATES GROSS DISCRIMINATION AMONG VOTERS WITHOUT A RATIONAL FOUNDATION IN POLICY

The Fourteenth Amendment's condemnation of irrational discrimination as between persons or groups of persons in the incidence of a law is squarely applicable to the apportionment of representatives in a State legislature. *Baker* v. *Carr,* 369 U.S. 186, 226. See also Brief for the United States in *Maryland Committee for Fair Representation* v. *Tawes,* No. 29, this Term, pp. 38–39, 50–51, and cases cited.

Under this principle the apportionment of seats in the Delaware legislature is manifestly unconstitutional. Taking the House of Representatives first, the district court in an opinion by an able and experienced circuit judge, found as a fact that there was

"no rational basis for the apportionment" (R. 510). This ultimate finding was based upon such subsidiary findings as that even under the 1963 reapportionment there is (R. 510)—

> one disparity as high as 12 to 1

and also—

> several at 11 to 1, 10 to 1 and 9 to 1

as well as—

> many at 8 to 1.

The district court also found that there are (*ibid.*)—

> vagaries existing in representative districts even contiguous to each other both in rural areas and in the City of Wilmington.

The result, the court pointed out, is to increase the power of favored districts to such an extent that a numerical majority of the Delaware House of Representatives is elected by districts having only 28 percent of the people.

The undisputed evidence fully supports the findings. The population of each district, as the districts were constituted by the 1963 amendment, is set forth below (R. 504):

Sussex County

District	Population
1	9,641
2	6,439
3	9,437
4	5,318
5	8,140
6	8,010
7	6,623
8	2,957
9	4,271
10	12,359
Total	73,195

Kent County

District	Population
1	6,084
2	17,806
3	3,361
4	3,716
5	9,125
6	2,626
7	7,880
8	5,168
9	4,956
10	4,929
Total	65,651

New Castle County (Wilmington)

District	Population
1	7,814
2A	16,886
2B [1]	16,886
3	18,359
4	5,394
5A	15,244
5B	15,244
Total	95,827

New Castle County (Outside Wilmington)

District	Population
6A	14,557
6B	14,557
6C	14,557
6D	14,557
7A	15,836
7B	15,836
7C	15,836
8A	11,714
8B	11,714
9	20,040
10A	13,431
10B	13,431
10C	13,431
11	9,325
12	3,401
13	5,218
14	2,534
15	1,643
Total	211,619
Total New Castle County	307,446

[1] The figures in this table for districts which will be divided under the 1963 amendments assume that the old districts will be divided so the new districts will be exactly equal in population. The governor has, since the opinion of the court below, issued a proclamation forming these districts (Appendix to App. Br., pp. 6a–10a). The actual population figures of these districts are, as far as we can ascertain, not available.

The inequalities are too numerous and too obvious to catalog but it may be permissible to mention the most egregious:

(a) District 15 in New Castle County has 10 times the representation of Districts 2A, 2B and 3 in the City of Wilmington. District 14 has five times the average representation in all seven districts in the City of Wilmington.

(b) There are two districts in Sussex County and five in Kent County that have more than three times the representation of each of five districts in the City of Wilmington.

(c) On the average, a voter in Kent County has just under twice the representation of voters in New Castle County. A voter in Sussex County has more than 1.6 times the representation.

(d) Within each of the three counties (omitting Wilmington) the inequalities are egregious. In New Castle County the smallest district has 12 times the representation of the largest; in Sussex, the ratio is 4 to 1, and in Kent, 6½ to 1.

(e) The net effect of the discrimination in favor of minorities is so great that representatives elected by only 28 percent of the people constitute a numerical majority of the lower house of the legislature.

In the selection of the Delaware assembly, the discriminations between persons and groups in the allocation of voting power are as capricious as they are egregious. There is no meaningful or even consistent policy in the composition of the districts. Although the district lines often correspond to a "hundred"—a subdivision of a county in Delaware (see p. 7,

note 1 above)—they frequently differ. While the representative districts in New Castle County outside Wilmington each formerly consisted of a single hundred, those in Wilmington consisted of two to four wards or portions of wards. In Sussex and Kent Counties, the districts consist of all or part of one, two, or three hundreds. (Even if the district lines were to conform to the ancient "hundreds," that fact would not justify the discrimination because the hundreds have no political or governmental significance.)

Viewed alone, the 1963 amendment was rational insofar as it provided that each representative district should receive an additional representative for each 15,000 people or major fraction thereof above a base of 15,000 people. The districts would then be subdivided. The total effect is to leave the apportionment of seats in the assembly still a crazy-quilt because no changes were made in the districts containing less than 15,000 people. Since there are 25 districts out of a total of 45 in which the ratio of representation is greater even than 1 to 10,000 persons, superimposing a rational rule upon a fraction of an irrational base did little to correct the capricious pattern described above.

Appellants offer no explanation of the gross discrimination in representation in the House of Representatives. The omission speaks volumes, for the case was tried long after the decision in *Baker* v. *Carr* and their brief was filed after the briefs in the first group of apportionment cases had focused attention upon the proposition that gross discrimination in *per capita* representation, resting upon no policy, violates the

Fourteenth Amendment. Appellants' only arguments upon this fundamental issue are that the legislature might have done better if more time had been available, and that over a long period the growth of the population may remove the injustices. The first point is obviously unsound: if the discrimination violates the complainants' constitutional rights, the Court will not rend an adjudication that there is no violation because the continuing wrong was initiated in a hurry. If more time is needed, it can be afforded in framing the decree. The second point is equally untenable: the possibility that time and changes in population may, at some remote day, eliminate the inequalities is not the slightest justification for tolerating the present deprivation of constitutional rights.

The apportionment of seats in the Delaware Senate is equally capricious. The State constitution prior to the 1963 amendment created 7 senatorial districts in New Castle County, each of which was allocated one senator, and 5 districts in both Kent and Sussex Counties, each of which was apportioned one senator, making a total of 17. The 1963 amendment gave Kent and Sussex two additional senators apiece, but it retained the old senatorial districts and superimposed two new floterial districts on each county.* Although

*Rather than disturb the existing districts in Kent and Sussex Counties, the Delaware Legislature gave each county two additional Senate districts by having part of each county elect one of its additional senators and the other part elect the other, in addition to the Senators from the five existing districts. We have difficulty in following appellants' assertion (Brief, p. 9) that the districts were formed by dividing the

each county is now allocated an equal number of senatorial districts in an apparent effort to justify the gross discrimination in *per capita* representation by reference to the United States Senate, the differences are plain. Delaware's senators do not represent the counties but geographical districts within the counties. The composition of the districts, within the counties, has no intelligible basis, as shown by the following table (R. 385, 505):

State into eastern and western halves, for the new seventh district in Kent County and the new sixth district in Sussex County stretch from the eastern half to the western half of the State. As a result, every voter in Kent or Sussex County votes for two senators; one from the pre-1963 district and one from the new floterial district in which he lives, while in New Castle County a citizen votes for only one senator (R. 386–387, 516).

The district court held this discrimination to be unconstitutional. We pretermit the question because the apportionment is unconstitutional however the question be decided. If each of the three counties had the same population and the districts within each county contained the same numbers of people, a mathematical argument could be made for the proposition that there was substantial equality. This can best be shown by an example: If each county had 70,000 people and seven senators, each voter in New Castle would be in a district of 10,000 people and would therefore elect 1/10,000 of a senator. On the other hand, voters in Kent and Sussex Counties would each be in two districts, one with 14,000 people and one with 35,000. They would therefore elect 1/14,000 of a senator plus 1/35,000 of a senator, which is 1/10,000 of a senator. We are not prepared to say, however, that the mathematical equality means that there is no substantial discrimination.

New Castle County		*Kent County*		*Sussex County*	
1	52,131	1	23,890	1	16,080
2	43,696	2	7,077	2	14,755
3	64,345	3	17,005	3	16,150
4	64,820	4	7,582	4	9,580
5	63,734	5	10,097	5	16,630
6	14,543	6[1]	(46,063)	6[1]	(38,975)
7	4,177	7[1]	(19,584)	7[1]	(34,220)
Total	307,446	Total	65,651	Total	73,195

[1] These are floterial districts which, between them, cover the entire county. See pp. 28-29, note 9 above.

Voters in the most overrepresented district in New Castle County have more than three times the representation of voters in any other New Castle district; they have more than 15 times the representation of the voters in the three most underrepresented districts. Voters in the second most overrepresented district in New Castle County have four times the representation of voters in three other districts. In Kent County disparities run in the ratio of 2 and 3 to 1. In Sussex County one district has 1½ times the representation of any other. Every district in Sussex County has six times the representation of the voters in the three most populous districts in New Castle County. The result of the disingenuous effort to make the apportionment of the Delaware Senate look like the composition of the Senate of the United States was greatly to increase the overrepresentation of the voters of Kent and Sussex Counties.

We can discover no explanation for the idiosyncrasies in the senatorial apportionment and districting: Appellants suggest no explanation whatever, save the obviously false analogy to the United States Senate.

The analogy would be false even if the relationship of a county to a State were like that of a State to the United States. In the United States Senate, the Senators represent their States and are chosen by the people thereof. In the Delaware Senate, the Senators come, not from the counties, but from geographical districts within the counties and are chosen by the people of the districts. There is nothing in the composition of the United States Senate remotely comparable to Delaware's gross and capricious discrimination in the representation of voters in different senatorial districts within a single county. Consequently, there is no need to discuss here whether the so-called "federal analogy" is pertinent in a State which apportions one branch of the legislature according to population and arranges to have its counties represented in the upper house in the same manner as the States are represented in the United States Senate.[10] The portions of the opinion below dealing with this subject are no part of the decree.

It follows that the apportionment of representation in the Delaware legislature denies the complainants equal protection of the law.

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[10] See Brief for the United States in *Maryland Committee for Fair Representation* v. *Tawes*, No. 29, this Term, pp. 73–82.

III

EVEN IF THE APPARENTLY CAPRICIOUS APPORTIONMENT OF THE DELAWARE LEGISLATURE HAD AN INTELLIGIBLE FOUNDATION, THE DISCRIMINATION WOULD VIOLATE THE EQUAL PROTECTION CLAUSE UNLESS BASED UPON CRITERIA RELEVANT TO LEGISLATIVE APPORTIONMENT

1. *The principle*

Since the districting and apportionment of representatives in elections for both branches of the Delaware legislature apparently has no intelligible foundation of any kind, it is probably superfluous to discuss which criteria of systematic differentiation might be constitutionally acceptable and which would violate the Fourteenth Amendment. But because some rationalization may be suggested, and because the oral argument of the previous reapportionment cases refined (but did not change) our analysis, we reiterate the proposition that a discriminatory apportionment violates the equal protection clause unless the differences in *per capita* representation bear a rational relationship to permissible objectives of legislative apportionment. See Briefs for the United States in *Maryland Committee for Fair Representation* v. *Tawes*, No. 29, this Term, pp. 39–43, and *WMCA, Inc.* v. *Simon*, No. 20, this Term, pp. 20–33.[11]

[11] Strictly speaking, the crazy-quilt test is probably insufficient standing alone. It must be applied in company with an additional rule, either implicit or explicit, that separates the permissible and impermissible bases of discrimination. If a State may prefer farmers over store-keepers in matters of apportionment, bankers over wage-earners, port cities over manufacturing centers, cities with a population of between 20,000 and 50,000 over both towns with less than 20,000 and cities with more than

In those briefs we suggested but did not adequately articulate the critical distinction between permissible [12] and impermissible objectives of legislative apportionment. The distinction is between (a) rules serving the purpose of making representative government work better, the operation of which may have the collateral consequence of creating *per capita* inequalities in representation, and (b) rules whose only function is to create classes of voters with preferred political rights disproportionate to their number, which we say are impermissible.

A legislature need not be simply a mirror to public sentiment like a Gallup poll. A legisature is a deliberative body, and deliberation requires knowledge. For that reason it might be thought to "make representative government work better" to take steps to ensure that representatives in one house of the legislature come from geographical districts small enough for them to know the distinct problems of every

50,000 and so forth, and if the rationalization can be supplied after the event because the Court cannot plumb the legislatures' true motives, then anyone with sufficient time and imagination could always find somewhere in the jumble of facts and potential policies some rule or compromise between many conflicting rules that would rationalize the apportionment. Compare the dissenting opinion of Mr. Justice Harlan in *Baker* v. *Carr*, 369 U.S. 330, 333–344.

In a case like *Baker v. Carr* or the instant case, there is hardly need to formulate the implicit limitation upon the acceptable kinds of rationalization, for the apportionments are so capricious and internally inconsistent that the defendants may be required to come forward with any explanation in terms of State policy and judgment will go against them if they fail.

[12] As repeatedly pointed out in these briefs, we assume them to be permissible for the purpose of these cases. See Brief for the United States in *Maryland Committee for Fair Representation* v. *Tawes*, No. 29, this Term, pp. 24–25.

locality, whether a unique local industry or a special need for schools or roads and bridges. Nantucket and Martha's Vineyard in Massachusetts are excellent examples. Geographically small districts might also be thought to enable the people to know their representatives better. Again, a legislature might conceivably be better informed and more representative if the apportionment recognized political subdivisions with an historic coherence and identity of their own. In an earlier age local political subdivisions formed a meeting place for discussion and the interchange of ideas, and the representative who went up to the legislature was speaking for the consensus in that community rather than for so many individuals. Even today the town hall or county court house may serve as the nerve center of a political organism attuned to local needs and opinions.

A legislature may also be better informed and more representative, in the sense that it is closer to its constituents, if there is a measure of continuity and stability in political arrangements; thus a State may limit the frequency with which it reapportions the legislature. Since effective political organizations help to make a legislature representative in this sense, a State might desire to conform the boundaries of election districts to the boundaries of local political subdivisions in order to reduce the number of geographical entities for which a separate organization must be created.

The foregoing illustrations are suggestive, not exclusive. We consider below (pp. 45–48) whether there is any limit upon a State's freedom in making an

apportionment on the basis of rules that serve the foregoing functions. Our point here is that those rules are different from differentiations or classifications among voters whose only function is to give farmers more representation than wage earners, shipping interests more representation than the manufacturing community, city dwellers more than suburbanites, or Protestants more than the Jews. The latter kind of distinction, when applied to political rights including representation, is the very antithesis of equality before the law. "The creation by law of favored groups of citizens and the grant to them of preferred political rights is the worst of all discriminations under a democratic system of government." *South* v. *Peters*, 339 U.S. 276, 279 (Justices Black and Douglas dissenting).

We find the support for this proposition in four areas. *First*, the principle that the policy knows no distinction in the political worth of one man as opposed to another, or of one group as opposed to another, is a fundamental strain in our political philosophy. The long appendix to our brief in the Maryland case shows the extent to which the idea of equal representation *per capita* was accepted in the Constitutional Convention of 1789 and the ratifying conventions as a principle applicable to any government dealing directly with its citizens. Two qualifications were widely accepted, but neither is relevant here. One was the principle that in a federation of sovereign States the States should have equal representation. That principle is manifestly inapplicable

within a State and, at most, it would justify representation by political subdivisions, not the creation of preferred classses. The other qualification was the view that there should be an upper house not directly chosen by the people. This was the theme of the remarks by Governor Randolph which the amicus brief of the Attorneys General of several States in the Maryland case cites (pp. 36–37) along with a quotation from James Madison in an effort to show that the constitutional convention was not in agreement that State legislatures ought to be apportioned according to population. Randolph's views upon the indirect election of the upper branch have nothing to do with the geographical apportionment of representatives elected by the people. His statement on the latter point unequivocally supports our reading of the records. Appendix B to the government's brief in the Maryland case, pp. 51–52. The burden of the quoted passage from Madison is unclear, but he often insisted that representatives should be apportioned in direct ratio to population. *Id.* at 4, 15–16, 22–24, 27, 32, 38–39, 45, 48, 53, 60–61, 70–71, 117–118. The only proposals to weight apportionment so as to preserve the political power of the original States were rejected.[13] *Id.* at 40, 50, 53.

The thrust of the Fourteenth Amendment is toward the elimination of all class distinctions in the exercise of political and other civil rights. There are no qualifications upon the equal protection clause. It

[13] For the possible convenience of the Court we have set forth in the Appendix an analysis of the historical materials in the brief of the State Attorneys General.

has general application. It has been applied specifically to laws dealing with participation in democratic self-government. *Nixon* v. *Condon*, 286 U.S. 73; *Gomillion* v. *Lightfoot*, 364 U.S. 339, 349 (Mr. Justice Whittaker concurring); *Gray* v. *Sanders*, 372 U.S. 368. Nothing could be more inconsistent with the basic spirit of the Amendment than the creation of special political classes with preferred voting rights or preferred representation..

There is nothing to the contrary in the history cited by appellants. The constitutions of the States readmitted to the Union after the enactment of the Fourteenth Amendment were all before the Court in *Baker* v. *Carr*, despite appellants' claims of originality, for Mr. Justice Frankfurter developed essentially the same arguments in his dissenting opinion in an effort to show that the Amendment is not concerned with legislative apportionment. 369 U.S. 186, 266, 315–317. The Court found the history unpersuasive, doubtless because it fails to show that Congress either concerned itself with the apportionment provisions of the State constitutions or was aware of their practical consequences. In addition, nothing is more apparent than that the limits of the guarantee of equal protection as applied in 1963 are not to be found in the constitutions and laws of the several States during the Reconstruction Period. See pp. 52–56 below. Even if it were otherwise, appellants' argument would be irrelevant to the point that we are now making—that our whole political history rejects the creation of fa-

vored political classes as a legitimate function of election laws or the apportionment of representatives."[14]

Although practice often fell short of the professed ideal,[15] each stage in our history has brough the ideal of *per capita* political equality closer to reality. As the Court said in *Gray* v. *Sanders*, 372 U.S. 368, 379–381:

> The concept of "we the people" under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.
>
> * * * * *
>
> The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.

Occasionally, one finds a political figure praising the unique virtue of the rural voter or defending the preferred voting power of special interests, but we know of no eminent statesman or political philosopher who has avowed the view it is proper to weight the legislature so as to assign to the farm interests, the wage-

[14] We have shown above the irrelevance of appellants' historical arguments as an answer to the fundamental defect charged against the Delaware apportionment—that it introduces gross and capricious discrimination into the apportionment of both houses of the legislature without even an intelligible foundation. See pp. 23–31 above.

We show below that the history, even if otherwise relevant, does not support such gross inequalities in both houses of the legislature as exist under Delaware's current constitution.

[15] There is scant support in practice for the extreme discrimination in many States today, which is chiefly a consequence of the more rapid growth of cities and suburbs.

earning interest, the urban interest, or any other class of voters political power disproportionate to its number.

Second, the practice in framing State constitutions bears out this contention. The central principle, quite uniformly, has been to base representation primarily upon population.[16] There are qualifications and limitations but they are nearly all consistent with the basic distinction which we are emphasizing. The limitations have been addressed, with rare exceptions, to making the legislature more representative by avoiding the creation of excessively large districts, by recognizing the coherent and independent identity of historic political subdivisions, by preserving a measure of stability, etc. No State constitution has ever openly espoused the view that it is a proper function of apportionment to allocate power to different social or economic classes out of proportion to their numbers. Few have provided for discrimination against populous areas merely because they are populous.[17] The practice has sometimes been different, but our shortcomings are not the measure of constitutional protection.

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[16] A brief survey of State constitutions is set forth in our brief in *Maryland Committee for Fair Representation* v. *Tawes*, No. 29, this Term, pp. 30–31. See also the dissenting opinion of Mr. Justice Frankfurter in *Baker* v. *Carr*, 369 U.S. 266, 309–318.

[17] New York systematically discriminates against citizens in counties having more than 6 percent of the State's population.

Maine, Oklahoma, Pennsylvania and Rhode Island limit the number of representatives a single city or town may have in one or both branches of the legislature. The Pennsylvania limitation has no practical effect because no city, on the basis of population, is entitled to more than the limit.

Third, it is plain that in closely related areas the equal protection clause prohibits the kind of discrimination which we are discussing. No one would argue that a State might deny the vote to bankers, or wage earners, or lawyers, or farmers. It seems equally clear that in electing a legislature it cannot, consistently with the Fourteenth Amendment, give 10 votes to every banker, 5 to every wage earner, 1 to every lawyer, or 50 to every farmer. How then can the State accomplish the same discrimination by giving some classes greater representation *per capita* and others less, in apportioning the seats?

Fourth, following the last point a step further, we submit that *Gray* v. *Sanders* is decisive of the point at issue. There, the Court squarely rejected the argument that the votes in rural areas could be weighted more heavily than votes in urban areas in choosing a governor (372 U.S. at 379):

> Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit.

If the rural voter is not entitled, by reason of his interests or residence alone, to have the State give him a greater voice in the selection of a governor than an

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The Rhode Island Supreme Court has held the Rhode Island limitations unconstitutional. *Sweeney* v. *Notte,* 183 A. 2d 296. Georgia, Maine and Texas give somewhat less representation *per capita* as the population of an area increases.

urban voter, then the rural voter is not entitled, by reason of that fact alone, to have greater representation in the legislature. This is not to say that *Gray* v. *Sanders* is decisive upon all aspects of the State apportionment cases. It is different because a legislative apportionment, unlike an election within a given area, may serve functions, such as those we have outlined, the achievement of which requires some departure from *per capita* equality of representation. An apportionment that serves such a purpose is not invalid merely because it happens to result, if measured by *per capita* representation, in classifications more or less corresponding to economic, occupational, or geographic groups. But *Gray* v. *Sanders* necessarily holds that the equal protection clause prohibits giving some classes of voters more weight than others on the ground that they have unusual virtue or special importance.[18]

The point may be clarified by a simple example. Assume a State with four counties, each with a population of 50,000 and also identical in every other respect save that one county, Pollak County, is pastoral:

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[18] We have discussed above (pp. 16–23) the reasons for rejecting any distinction based upon an argument that although *per capita* comparisons measure equality in an election within a single constituency they do not truly measure equality or inequality in a representative body.

Spritzer County		*Friedman County*	
Population	50,000	Population	50,000
Unit Votes	10	Unit Votes	10
Representatives	10	Representatives	10
Barnett County		*Pollak County (Pastoral)*	
Population	50,000	Population	50,000
Unit Votes	10	Unit Votes	31
Representatives	10	Representatives	31

Gray v. *Sanders* squarely holds that the discrimination inherent in giving the 50,000 people of Pollak County 31 unit votes in the election of a governor as opposed to the people of Spritzer, Friedman and Barnett Counties, who receive only 10 unit votes apiece for 50,000 people, cannot be justified by an alleged State policy of fostering the pastoral way of life. It follows that the policy is equally irrelevant as a justification for giving Pollak County 31 representatives in the legislature as opposed to the 10 representatives apiece allocated to the other counties despite their identical size and population. The equal protection clause bars laws which serve only the function of creating of favored political classes whether it be in the choice of a governor or the selection of a legislature.

We recognize that such distinctions are not unconstitutional in every context. In enacting tax or regulatory laws and in granting appropriations or other benefits, a State is free, within reason, to encourage one industry or discourage another, to protect the wage earner against the employer or the employer

against the union, etc. It may take into account the special problems of the farmer as opposed to the consumer and grant exemptions or privileges not accorded to others. But that kind of classification, we submit, is not permissible in respect to political rights. The Fourteenth Amendment guarantees the rich and the poor, the banker and the wage earner, the farmer and the city dweller, like the Catholic and the Protestant, equality before the law defining the opportunities for participation in self-government.

Precedent amply sustains the view that differentiations which may be permissible in one context become irrelevant in another. A man's income may be relevant for purposes of taxation, but since it has no bearing upon his guilt or innocence when charged with crime, a State cannot give an appeal to the man who can afford to buy a transcript but deny it to one who is too poor. *Griffin* v. *Illinois*, 351 U.S. 12. The nice lines between larceny and embezzlement may be constitutionally acceptable in the ordinary administration of criminal justice but not in relation to so fundamental a human right as procreation. *Skinner* v. *Oklahoma*, 316 U.S. 535.

2. *Application to the instant case*

We can discover *no* policy to support the capricious discriminations in the apportionment of both branches of the Delaware legislature. *A fortiori* there is none that can be defended as relevant to the permissible purposes of legislative apportionment. Delaware's apportionment nowise resembles the State constitutions that guarantee each county at least one repre-

sentative, or provide for an upper branch made up of representatives of the counties, chosen by the equal votes of all the county's citizens.

Appellants state (Br. 9) that the two additional senators given to Kent and Sussex Counties by the 1963 amendment were allocated to the eastern and western halves of each county. Since one new district in each county extends across the whole State, we question the accuracy of the assertion. Even if accurate, it is irrelevant. Surely the distinction between the eastern and western halves of Kent County is not an adequate justification for constituting the districts so that District 7 with a population of 19,584 has the same representation in the Senate as District 6 with a population of 46,063, a ratio of worse than 2 to 1. And, of course the method of apportioning the two additional seats given to each of the two counties does nothing to justify the gross inequalities not only between the counties but among the districts within the counties.

Nor is there any indication that senators or representatives are distributed on the basis of area in an effort to give each part of the State representation in the legislature. The contrary appears clear from the widely differing size of the districts. Moreover, districts large in area often have greatly more population than those much smaller, yet each has only one representative. For example, the second representative district of Kent County has well over twice the population and size of that county's seventh district. The tenth representative district of Sussex County has almost three times the population and size of that

county's ninth district. The first senatorial district of Kent County has one-third more population than the third district although the former is approximately four times larger.

The boundaries of the ancient "hundreds" (see p. 7 above) play some part in the districting, but it is plain that they neither explain nor justify the inequalities. Sometimes hundreds or portions of hundreds are combined; sometimes they are subdivided. Furthermore, it is plain that the hundreds have no governmental functions or other meaningful identity that could be supposed to give its representation as such a useful function in making representative government work better.

IV

THE APPORTIONMENT OF THE DELAWARE LEGISLATURE VIOLATES THE EQUAL PROTECTION CLAUSE BY SUBORDINATING POPULAR REPRESENTATION TO THE REPRESENTATION OF POLITICAL SUBDIVISIONS TO SUCH A DEGREE AS TO CREATE GROSS INEQUALITIES AMONG VOTERS AND GIVE CONTROL OF BOTH HOUSES OF THE LEGISLATURE TO SMALL MINORITIES OF THE PEOPLE

Apart from the fatal defects already discussed, the apportionment of the Delaware legislature is unconstitutional because any otherwise permissible objectives that disparities in *per capita* representation might be supposed to secure are insufficient to justify such gross inequalities and total disregard for the principle of majority rule as exist in the selection of representatives to both the Senate and House of Representatives. As we have shown in our previous briefs, objectives that might furnish acceptable justification

for some variations from equal representation *per capita*[19] become so relatively inconsequential as to render the discrimination arbitrary and capricious where the inequalities are grosser and the principle of majority rule has been totally submerged in both houses of the legislature. See especially Brief for the United States in *Maryland Committee for Fair Representation* v. *Tawes*, pp. 46–50, 57–73.

Measured by any reasonable standard, the apportionment of the Delaware legislature creates gross inequalities among voters and allows a small minority to control the legislature. We have seen above (pp. 24–30) the wide disparities of voting power among persons residing in the various counties and senatorial and representative districts. The disparities are as high as 15 to 1 in the Senate and 12 to 1 in the House of Representatives. There are gross disparities between districts within the same county as well as across county lines.

A majority of the members of the House is elected by persons residing in districts with only 28 percent of the population. A majority of the Senate is elected by persons residing in districts with only 21 percent of the population—a reduction of 1 percent

[19] Since the instant case, like the State apportionment cases, argued earlier this Term, can be decided without ruling upon whether the Fourteenth Amendment requires substantially equal representation *per capita* in both houses of a State legislature, we assume here, as we have in those cases that there may be permissible objectives of legislative apportionment that would justify some departure from equality *per capita*. The asssumption is made *arguendo* reserving further judgment until the issues are presented.

as a result of the 1963 amendments. The Delaware legislature considered as whole is worse apportioned than any of the States involved in the State apportionment cases argued last month. Indeed, measured by the percentage of votes able to elect a majority of the two houses, it is the third worst apportioned legislature in the country.[20]

The discrimination in both houses seems to run almost entirely in favor of the same areas. For example, the two least populous house districts in the State (numbers 14 and 15 in New Castle County), comprise the least populous senatorial district (number 7 in New Castle County). The second and third least populous districts in Kent County (numbers 3 and 4), form the least populous Senate district in that county (number 2). The least and fifth least populous house districts in Kent County (numbers 6 and 9) form the second least populous Senate district in the county (number 4). The least and fifth least populous house districts in Sussex County (numbers 7 and 8) form the county's least populous Senate district (number 4). Conversely, the 20 most populous house districts (New Castle County numbers 2A, 2B, 3, 5A, 5B, 6A, 6B, 6C, 6D, 7A, 7B, 7C, 8A, 8B, 9, 10A, 10B, 10C; Kent County number 2; Sussex County number 10) are in seven of the eight most populous Senate districts (New Castle County numbers 1, 2, 3, 4, 5; Kent County number 1; Sussex County num-

[20] The worse apportioned legislatures from this standpoint are Florida and Nevada. Maryland is approximately the same as Delaware. This ranking has been calculated by adding together the percentage of the voters needed to elect a majority of each of the two houses of the 49 bicameral State legislatures.

ber 5); only the seventh most populous Senate district (Kent County number 3) is formed of less populous house districts.[21]

In short, the inequality in each house adds to the inequality in the other. We submit that, where, as here, a small part of the people is given complete control of the legislature, the apportionment violates the Fourteenth Amendment regardless of any justification that can now be advanced. The justifications sometimes put forward by larger States would carry less weight here even if they fitted the apportionment. Delaware is the second smallest State in the country. Seventy-one senators and forty-one representatives would, if apportioned directly on the basis of population, still represent extremely small districts. Kent County, the least populous county, would still be entitled to three senators and six or seven representatives for an area of less than 595 square miles—an average of less than 100 square miles per representative.

It is plain that the analogy appellants seek to draw between the apportionment of the Delaware legislature and the Congress of the United States is no answer to the point we have been making. There is plainly no analogy, among other reasons because the actual apportionment of the Delaware legislature bears no resemblance to the constitutional apportionment of the Congress.

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[21] In considering the Senate districts, we have not included the Senate districts created by the 1963 amendments in Sussex and Kent Counties which overlap with the earlier districts.

First, the Constitution of the United States provides an obviously intelligible basis for apportioning Congress. Each State is entitled to two members of the Senate. Art. I, Sec. 3. The members of the House of Representatives are apportioned on the basis of population, except that each State is guaranteed a minimum of one. Art. I, Sec. 2. In contrast, as we have seen above (pp. 23–31), the apportionment of both houses of the Delaware legislature is a crazy-quilt, having neither rhyme nor reason. Both the Senate and House districts vary widely in population without any intelligible explanation.

Second, the limitations on apportionment based strictly on population in the Constitution concerning the United States Congress are relevant to the representative process. They are intended to give each State, *i.e.*, each political subdivision, equal representation in the Senate and minimum representation in the House of Representatives. Delaware's apportionment has no comparable objectives.

Third, even if it were not a crazy-quilt, the Delaware Senate is not apportioned like that of the United States. While each county has seven senators, the Senate is actually elected from districts within the counties rather than by the counties themselves. These districts are merely arbitrary units formed for election purposes which are unequal in population. Thus, unlike the United States Senate, the Delaware Senate does not consist of representatives of govern-

mental subdivisions which are given equal numbers of legislators who represent the subdivision on a corporate basis. Instead, the Delaware Senate is composed of representatives from individual districts with no corporate existence or governmental significance apart from elections.

Fourth, the apportionment of the Delaware House of Representatives is so lacking in relation to population that a numerical majority comes from districts containing only 28 percent of the people. The history of the Constitution and its ratification shows that the framers intended that the federal House of Representatives would be apportioned between the States on the basis of population. While each State is assured of at least one Representative, it is clear that the framers expected that each State would have enough population to entitle it to one Representative without this guarantee. Thus, the Constitution sets the minimum ratio of Representatives to population at one to 30,000 (Art. I, Sec. 2), which was below the population of any of the States at the time. And the first apportionment of the House of Representatives, which is contained in the Constitution itself (Art. I, Sec. 2), gives more than two representatives to every State except Rhode Island and Delaware, and those two States would have been entitled to such representation on the basis of their population.

Today only four States have less than 1/435 of the population.[22] All have over half the ratio and would be entitled to a representative, even without the mini-

[22] Vermont, Wyoming, Nevada, and Alaska.

mum guarantee, under the equal proportions method of allocating representatives which Congress now follows. 2 U.S.C. 2a. Thus, the federal House of Representatives, in effect, is apportioned by the Constitution among the States almost exactly in conformity with population. It takes representatives from States with almost 50 percent of the population to constitute a majority of the House.[23]

The apportionment of the Delaware House of Representatives between counties is based only partially on population. New Castle County is guaranteed fifteen representatives and Kent and Sussex ten apiece; thus, 35 of the present 45 representatives are allocated wholly without regard to population.[24] Furthermore, the 35 representatives are distributed within the counties with no real regard for population, being elected from grossly unequal districts arbitrarily established

[23] Unfair districting within the States by the State legislatures, however, has resulted in having a majority of representatives elected from *districts* having only 42 percent of the population. Such unfair districting is probably unconstitutional. See the government's brief in *Wesberry* v. *Sanders*, No. 22, this Term, pp. 30–35.

[24] In addition, the other ten representatives are allocated according to the population of arbitrarily formed election districts rather than on a basis of the population of the county as a whole. Thus, a county could be given additional representation if one of its districts was populous even though the other districts were so unpopulous that the county as a whole would be entitled to no more representation. At present, this has not occurred since only the most populous county, New Castle, has received additional representation under the 1963 amendment. However, if the second representative district of Kent gains less than 5,000 people it will receive an additional representative although the county as a whole is overrepresented now.

for election purposes. The net result is that only 28 percent of the people of Delaware live in districts electing over half the State House of Representatives. The federal analogy, therefore, does not apply, since Delaware does not apportion either house of the legislature on the basis of population.[25]

Nor can anything be found in the history of the readmission of the seceded States that supports the notion that the equal protection clause permits the gross discrimination in *per capita* representation found in both houses of the Delaware legislature. In the first place, as the history set forth by the appellants shows, Congress did not even advert to the problem of apportionment in readmitting the Southern States.[26] For, at that time, unlike the time

[25] Even if the apportionment of the Delaware General Assembly was factually similar to the apportionment of Congress, the federal analogy would not apply. The equality of representation by States in the United States Senate recognized that the new government was in part a continuation of the old confederation of sovereign States. See our brief in the Maryland case, pp. 73–82. Whether or not the three counties of Delaware were sovereign for three months in 1776 as appellants contend, they are today "nothing more than political subdivisions of [the] State[s]" with "restricted powers and duties" delegated by the legislature. *State* v. *Warwick*, 108 A. 2d 85, 89 (Del. Superior Ct.). And of course the application of the Fourteenth Amendment depends on present facts and circumstances. *Brown* v. *Board of Education*, 347 U.S. 483, 492–493.

[26] Appellants state (Br. 67) that "the Federal pattern for a legislature was discussed in the course of the debates." The relevant "excerpts from the debates" included in appellants' brief (pp. 112–132) contain no discussion whatever of the apportionments provided in any of the State constitutions under examination. Perhaps appellants' are referring to a speech by Senator Sumner (App. Br. 119–121) which discusses the equality of the States under the 1789 Constitutions, and par-

of the adoption of the original Constitution and again during the last few decades, apportionment was not an issue of major importance. There is no way to know whether, if the issue had been squarely posed, Congress would have considered that the equal protection clause applied to apportionment of State legislatures at all and, if it did, what standards were appropriate.

Second, this Court long ago made it clear that the protection afforded by the Fourteenth Amendment cannot be limited by historical research into the conscious intent of its framers. In *Brown* v. *Board of Education*, 347 U.S. 483, massive briefs and "[r]eargument [were] largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. [They] covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of the proponents and opponents of the Amendment." *Id.* at 489. Despite this extensive historical analysis, the Court found that history was "inconclusive" (*ibid.*):

> The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all per-

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ticularly equal representation in the Senate." However, Senator Sumner does not even suggest that this equality among sovereign States is relevant to the apportionment of State legislatures. Indeed, he explicitly stated that he was speaking on an entirely different subject ("What I have to say today will be confined to a single topic. I shall speak of the *validity and necessity of fundamental conditions on the admission of States into the body of the Nation* * * * (emphasis in original)). 80 Cong. Globe 3024.

> sons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

Furthermore, the Court went on to say that "[i]n approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even in 1896 when *Plessy* v. *Ferguson* was written." *Id.* at 492.

The silence as to apportionment leaves the historical issue in this area even more uncertain. The history that appellants invoke was all brought to the Court's attention in *Baker* v. *Carr* by the dissenting opinion of Mr. Justice Frankfurter. The argument was rejected.

Finally, appellants' history, even if otherwise persuasive, does not sustain the present Delaware apportionment. At most, the history shows that some deviations from *per capita* representation in the readmitted States provoked no objection. There is no evidence that Congress knew of them; nor that it knew whether they were large or small. In point of fact, five of the State constitutions, as appellants admit (Br. 57), provided for the apportionment of both houses on the basis of population. In the other five the disparities were small compared to those existing today in Delaware. The South Carolina Constitution of 1868 provided for a Senate composed of one senator for each county, except Charlestown County was to receive two, and a House of Representatives apportioned according to population except

that each county was given one. As a result, 36 and 44 percent of the people lived in counties electing a majority of the two houses.

The Georgia Constitution of 1868 provided no standard for the reapportionment of either House. The initial apportionment specified in the Constitution grouped three counties into each single-member senatorial district and gave three seats in the House to the six largest counties, two seats to the next 31, and one to the rest. Consequently, 36 and 37 percent of the people lived in counties electing a majority of the two branches.

In Florida, the 1868 Constitution apportioned the Senate by districts without stating any standard and gave a representative for each county and an additional representative for each 1,000 "registered votes." A majority of both houses could be elected by persons residing in counties with 33 and 27 percent of the people, respectively.

The Louisiana Constitution of 1868 provided no standard for apportioning the Senate, but apportioned the House of Representatives on the basis of population with each parish receiving at least one member. Under the initial apportionment specified in the constitution, 48 and 40 percent of the people lived in counties electing a majority of the two houses.

Finally, the Virginia Constitution of 1870 provided no standard for apportionment. The initial apportionment specified in the Constitution resulted in 44 and 40 percent of the people residing in counties electing a majority of the legislature.

Except for Louisiana, the percent figures are based on the 1870 census because the Civil War caused significant relocation of population. In no State did the

malapportionment approach the severity of that now existing in Delaware.

V

THE INJUNCTION ORDERED BY THE DISTRICT COURT IS NOT AN ABUSE OF DISCRETION

The district court, after holding unconstitutional the provisions of the Delaware Constitution apportioning seats in the State legislature, entered a declaratory judgment and later enjoined the appellant election officials from holding elections thereunder. Since, as we have shown above, this determination was correct, the district court was acting well within its discretion in enjoining the existing apportionment. The traditional remedy when a State statute is held unconstitutional is to enjoin further action thereunder. *E.g., Ex parte Young,* 209 U.S. 123. The State and lower federal courts have in numerous cases used this remedy in the field of apportionment. *E.g., Sims* v. *Frink,* 208 F. Supp. 431 (M.D. Ala.), pending on appeal *sub nom. Reynolds* v. *Sims,* Nos. 23, 27, 41, this Term; *Davis* v. *Mann,* 213 F. Supp. 577 (E.D. Va.), pending on appeal, No. 69, this Term; *Thigpen* v. *Meyers,* U.S. D.C., W.D. Wash., decided May 3, 1963, pending on appeal, No. 381, this Term; *Scholle* v. *Secretary of State,* 367 Mich. 176, 116 N.W. 2d 350; *Parker* v. *State,* 133 Ind. 178, 32 N.E. 836; *Denny* v. *State,* 144 Ind. 503, 42 N.E. 929; *Brooks* v. *State,* 162 Ind. 568, 70 N.E. 980; *Ragland* v. *Anderson,* 125 Ky. 141, 100 S.W. 865; *Armstrong* v. *Mitten,* 95 Colo. 425, 37 P. 2d 757; *Stiglitz* v. *Schardien,* 239 Ky. 799, 40 S.W. 2d 315; *Rogers* v. *Morgan,* 127 Neb. 456, 256 N.W. 1; *State ex rel. Lamb* v. *Cunningham,* 83 Wis. 90, 53 N.W. 35; *State*

ex rel. Attorney General v. *Cunningham*, 81 Wis. 440, 51 N.W. 724; *Asbury Park Press, Inc.* v. *Woolley*, 33 N.J. 1, 161 A. 2d 705, 713–714.

Appellants contend (Br. 98–110) that the Delaware legislature should have been given the opportunity to reapportion itself before the injunction was issued. The legislature had already had the opportunity. After indicating doubt about the existing Delaware apportionment, the court in a pre-trial order gave the legislature time to act (R. 66–76).[27] The deadline was fixed to meet the requirements of Delaware's election laws (R. 75–76). The legislature, in response, passed a constitutional amendment at two successive sessions.[28] In the Senate, the amendment gave the already-over-represented counties, Kent and Sussex, two additional members apiece. The existing wide disparities in senatorial districts within the counties (see pp. 28–30 above) were left unchanged and the percentage of people living in districts which elected a numerical majority of the Senate was reduced from 22 to 21

[27] Several other courts have likewise delayed determining the constitutionality of State apportionment so the legislature could act. *Lein* v. *Sathre*, 205 F. Supp. 536, 540 (D. N.D.); *Magraw* v. *Donovan*, 163 F. Supp. 184, 187–188 (D. Minn.); *Mikell* v. *Rousseau*, 183 A. 2d 817, 823 (Vt. Sup. Ct.); *Asbury Park Press, Inc.* v. *Woolley*, 33 N.J. 1, 161 A. 2d 705, 714–715; *In re Legislative Reapportionment*, 374 P. 2d 66, 71–72 (Colo. Sup. Ct.); *Butcher* v. *Trimarchi*, 28 D. & C. 2d (Pa.) 537, 542.

[28] The Delaware Constitution provides two procedures for amendment, both of which depend on the legislature. First, the legislature may itself adopt an amendment by passage by two-thirds vote at two consecutive sessions. Art. 16, § 1. Second, the legislature by two-thirds vote may place on the ballot the question whether to hold a constitution convention and, if a majority of the voters so decide, a convention is held. Art. 16, § 2.

percent. The amendment gave some additional representation in the lower house to populous districts in New Castle County but left untouched many of the existing disparities between and within counties (see pp. 24–28 above). The percentage of people living in districts electing a majority of the House of Representatives was raised only from 19 to 28 percent.

In short, the Amendment hardly constituted a serious effort by the legislature to give fair representation in either house to all the people of Delaware. The district court in these circumstances was entitled to decree a reapportionment, as was done in the Alabama case now before the Court. *Sims* v. *Frink,* 208 F. Supp. 431, pending on appeal *sub nom. Reynolds* v. *Sims,* Nos. 23, 27, 41, this Term; accord, *Moss* v. *Burkhart,* U.S. D.C., W.D. Okla., decided July 17, 1963; *Sobel* v. *Adams,* 208 F. Supp. 316, 318 (S.D. Fla.); *Toombs* v. *Fortson,* U.S. D.C., N.D. Ga., decided September 5, 1962. See also *Fortner* v. *Barnett,* No. 59,965, Chancery Court, First Judicial District, Hinds County, Mississippi; *Stevens* v. *Faubus,* 354 S.W. 2d 707, 711 (Ark. Sup. Ct.).

The court below stopped short of specifying an apportionment. While it indicated guidelines for testing the constitutionality of a State legislative apportionment in its opinion, they are not part of the order. The decree merely enjoins holding a new election under the unconstitutional apportionment, while allowing the legislature to reapportion itself. It is true that the legislature will not be able before the 1964 elections to pass a constitutional amendment at two consecutive sessions. But, since the existing con-

stitutional provisions have been held invalid, there is no reason why the new apportionment cannot be enacted by statute. No provision in the State constitution prohibits apportionment by statute where no valid apportionment provision exists in the constitution itself. Furthermore, the statutory apportionment need be only temporary. By passing a valid constitutional amendment now, the legislature elected in 1964 can adopt it by approving it again.

In these circumstances, the district court plainly did not abuse its discretion. The Delaware apportionment violated the Fourteenth Amendment. The court decreed the narrowest remedy possible to correct an unconstitutional provision of a State constitution—an injunction against its continued operation. The court could provide time for a constitutional amendment without permitting the election of still another legislature in violation of the complainants' constitutional rights. The State still retains freedom to shape its own system of apportionment subject to the requirements of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, we respectfully submit that the decision of the district court should be affirmed.

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DECEMBER 1963.

APPENDIX

1. In a brief filed as *amici curiae* in the four State apportionment cases argued earlier this Term, fourteen State Attorneys General dispute (pp. 19–32) the government's historical analysis of the Constitutional Convention of 1787 as supporting the constitutional requirement that State legislatures be apportioned on the basis of population. First, they say (Br. 20–24, 26) that the framers repeatedly analogized apportionment of the State legislatures and the apportionment of the legislature in the new "national" government; that the apportionment of the State legislatures was frequently not based on population, such as New Jersey which gave each county a member of the State Senate; and that therefore similar apportionments today may properly be analogized to the United States Senate. It is true that the framers did refer to the apportionment of the State legislatures. But, with only one exception, they did not approve apportionments which gave some voters more representation than others. The *amici's* own examples (Br. 22) prove this point.

Madison's statement that "there was the same reason for different numbers of representatives from different States, as from Counties of different extents within particular States" is part of a speech opposing equal representation from every State in the new legislature. Madison argued that the new nation would no longer be "a federal one among sovereign States" but a "national Governt." I *Records of the*

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Federal Convention (Farrand ed., 1911), p. 37. The entire speech, insofar as is relevant is:[1]

> [W]hatever reason might have existed for the equality of suffrage when the Union was a federal one among sovereign States, it must cease when a national Govermt. should be put into the place. In the former case, the acts of Congs. depended so much for their efficacy on the cooperation of the States, that these had a weight both within & without Congress, nearly in proportion to their extent and importance. In the latter case, as the acts of the Genl. Govt. would take effect without the intervention of the State legislatures, a vote from a small State wd. have the same efficacy & importance as a vote from a large one, and there was the same reason for different numbers of representatives from different States, as from Counties of different extents within particular States.

Madison refers to State apportionment among counties to support his position because they likewise are not entitled to equal representation, regardless of population, in the legislature. The convention, as Madison himself recognized in the *Federalist Papers*, rejected his view that the new constitution would form a national government and end State sovereignty in favor of adopting a mixed national government. Appendix B to the government's brief in the Maryland case [hereinafter Appendix B], pp. 69, 71–72, 77–78. Consequently, Madison's analogy between the new legislature and the State legislatures does not apply to the constitution as it actually exists.

The second statement of Madison relied on by the *amici* (p. 22) is that "[t]he counties in Virginia are

[1] This speech, which strongly supports the government's position, was unfortunately omitted from the Appendix to our brief in the Maryland case.

exceedingly disproportionate, and yet the smaller has an equal vote with the greater, and no inconvenience arises." This quotation, which comes from the notes of Robert Yates, a convention delegate, is, as we pointed out in Appendix B, p. 24, note 10, almost certainly erroneous. Appendix B contains at least twelve statements by Madison (pp. 4, 15–16, 22–24, 27, 33, 38–39, 45, 48, 53, 60–61, 70–71, 117–118) made at the convention and elsewhere strongly supporting representation both in the federal and State governments based directly on population and attacking other methods of apportionment as unjust. Moreover, Madison's own account of his speech (Appendix B, pp. 22–24) contains no such statement. On the contrary, he says that "Counties of the same States [are] represented in proportion to their numbers" and argues that, since the new government will be supreme, just as the States have been, the legislature must be apportioned on the basis of population as a matter of justice. Thus, again, Madison's speech supports our position that the framers believed that a legislature in a government operating directly on the people must be apportioned on the basis of population and that therefore this was the only fair method of apportioning State legislatures. While, as the *amici* suggest (Br. 21), Madison may have been factually wrong in assuming that the State legislatures of his time were all apportioned on the basis of population whereas several were not, his view of the only fair method of apportionment is plain.

The *amici* then quote Gunning Bedford of Delaware that "[a]n exact proportion in the Representation is not preserved in any one of the States." Appendix B, p. 36. Aside from the fact that *perfect* apportionment based on population is a virtual impossibility for which no one contends, Bedford's basic

argument is that equal representation in the new legislature is required because there is to be "a mere confederacy of the States," not "a perfect consolidation." *Ibid.* He refers to the State legislatures, like the malapportionment of Great Britain, merely to show that all legislatures need not be apportioned by population. He does not praise the unequal apportionment of State legislatures, and implies that, if the new government were to be a consolidation ending the sovereignty of the States, he would not support equal representation for the States.

The *amici* quote (p. 22) a speech by Elbridge Gerry stating that in the State legislatures one branch is often "somewhat aristocratic" which he said would assure "a better chance" of refinement in the choice of representatives. 1 Farrand 155.[2] This statement was, however, made in support of election by the State legislatures, rather than the people. It has nothing to do with apportionment since apportionment can be made on the basis of population whatever method of election is used. This is made clear by the fact that Gerry stated at the convention that allowing each State in the Confederation an equal voice was an "injustice." Appendix B, pp. 29–30. He agreed to equal representation in the Senate only because a compromise was made to form less than "a proper national plan." Appendix B, p. 44.

The statement by Hugh Williamson referred to by the *amici* is part of a speech supporting apportionment based on population. He (Appendix B, p. 7):

> illustrated the cases by a comparison of the different States, to Counties of different sizes within the same States; observing that proportional representation was admitted to be just in

[2] This quotation was not included in Appendix B since, for the reasons stated above, it is irrelevant.

> the latter case, and could not therefore be fairly contested in the former.

This statement can hardly be used to support an apportionment giving each county equal representation regardless of population.

The reference by Randolph cited by the *amici* (I Farrand 26–27) is to various State legislatures which have been feeble and inadequate because they were too democratic. But while he obviously did not want the people directly to control all organs of the government, he did not even suggest that apportionment should be based other than on population. Moreover, Randolph was one of the most vigorous supporters at the convention of apportionment based directly on population. See Appendix B, pp. 51–52.

The *amici* cite (Br. 26) a statement by Hamilton that "individuals forming political Societies modify their rights differently, with regard to suffrage. Examples of it are found in all the States." Appendix B, p. 28. This was merely a statement of the fact that many persons were not entitled to vote. It was certainly not a defense of apportionment on some basis other than population since Hamilton went on in the speech to attack proposals to give each State the same representation. And earlier in the convention, Hamilton had stated that equal representation for each State "shocks too much the ideas of Justice, and every human feeling * * *." Appendix B, p. 14.

The *amici* omit other references to the apportionment of State legislatures. Madison argued for the adoption of what is now Article I, Section 4, giving Congress power to regulate federal elections because unfair apportionment of State legislatures might lead to similar results in Congressional districting. Appendix B, pp. 63–64. He repeated this contention at

the Virginia ratifying convention in attacking the injustice of South Carolina's discriminatory apportionment. Appendix B, p. 98. At the Massachusetts ratifying convention, Francis Dana and Rufus King defended Article I, Section 4, in part by pointing to the unfair apportionments of South Carolina, Rhode Island, Connecticut, and Great Britain. Appendix B, pp. 93–94. At the same convention, John Coffin Jones and James Bowdoin praised the State legislatures as generally apportioned by population. Appendix B, p. 94.

We, and apparently the *amici*, have found but one statement at the convention supporting their position.[3] Nathaniel Gorham of Massachusetts, in support of the compromise according each State equal representation in the Senate, stated (Appendix B, pp. 17–18):

> If Va. should have 16 votes & Delre. with several other States together 16. those from Virga. would be more likely to unite than the others, and would therefore have an undue influence. This remark was applicable not only to States, but to Counties or other districts of the same State. Accordingly the Constitution of Massts. had provided that the representatives of the larger districts should not be in an exact ratio to their numbers. And experience he thought had shewn the provision to be expedient.

[3] Gouverneur Morris of Pennsylvania approved of efforts in his own State to prevent backwoodsmen from having their fair representation in the legislature because he thought that they might attain control. Appendix B, p. 53. This was part of Morris' argument that the presentation of new States in the national legislature should be limited so that they never could attain a majority. However, Madison and others vigorously opposed the proposal (Appendix B, p. 53), and the convention rejected it.

Clearly, Gorham was justifying consideration of factors other than population in apportioning State legislatures just as in the new legislature. He does not, however, say that State apportionments can, like the new Senate, give equal representation to each county. For, he referred to the Massachusetts Constitution of 1780 which provided that the Senate would be apportioned among the districts on the basis of taxes paid (a method of apportionment considered at the time as analogous to population) and that the House of Representatives would be apportioned by giving to each town having 450 voters one member and an additional member for every 225 additional voters, except that each existing town was given at least one. Part II, Ch. I, Sec. 2, Art. I, and Sec. 3, Art. II. Thus, the Massachusetts legislature was apportioned largely in proportion to taxes and population.

One statement, made by a delegate having no particularly significant part in the convention, is hardly enough to show that the framers believed that the apportionment of State Senates was analogous to the apportionment of the Senate of the United States. This would be so even if the convention contained no other statements on this subject. But, as shown above and particularly in our brief in the Maryland case (pp. 75–80), the whole history of the Constitution demonstrates the contrary conclusion.

In short, the references to the States legislature apportionments at the Philadelphia convention and the subsequent ratifying convention do not support the proposition that State Senators are analogous to that of the United States. The references cited above show that framers overwhelmingly believed that the only fair method of apportioning State legislatures is according to population. Madison and Williamson argued that the new legislature should like-

wise be apportioned by population because they desired a truly national government ending State sovereignty and operating directly on the people. But this was not the result of the convention. Instead, the new government was to be a mixture of a national government and a confederation, with the House of Representatives reflecting the former and the Senate the latter. Since the States are not such a mixture, their legislatures, as the framers plainly believed, must be apportioned on the basis of population.

2. The *amici* Attorneys General also claim (Br. 27–29) that the federal anology is valid because many of the framers of the constitutional convention proposed limiting the democratic features of the new government. This we do not dispute. Our point is rather that those supporting a national government operating directly on the people strongly supported apportionment of the entire legislature, whether it was to be one or two houses, on the basis of population. This was true even when they opposed election of the legislature by the people in favor of election by the State legislatures.

The framers cited by the *amici* made clear that apportionment of the legislature or a non-population basis was not intended to be one of the permissible checks on control by the people. The *amici* cite (Br. 27–28, 32, 34, 37) Randolph, Gerry, and Madison. Not only do none of these statements even suggest that apportionment on any basis but population is fair, but, as we have seen above (pp. 61–65), all three vigorously supported apportionment based entirely on population.

The *amici* quote (Br. 28–29) a series of statements made by proponents of the plan finally adopted of equal representation of States in the Senate. The quotations state that equal representation was needed

to prevent the populous States from dominating and destroying the less populous. It is significant, however, that these men believed in representation by States rather than people entirely because they considered the new government as either a mere continuation of the old Confederation although with somewhat enhanced powers or as a mixture of a Confederation and a national government.

In the same speech quoted by the *amici* in which William Paterson of New Jersey said he feared that his State "would be swallowed up" (I Farrand 179), he plainly stated (Appendix B, p. 6):

> A confederacy supposes sovereignty in the members composing it & sovereignty supposes equality. If we are to be considered as a nation, all State distinctions must be abolished, the whole must be thrown into hotchpot, and when an equal division is made, then there may be fairly an equality of representation.[4]

Later, he said that apportionment based on population "is right in principle" if "state distinctions are done away; but those to certain purposes still exist." Appendix B, p. 12. On several other occasions, he made plain that equal representation by States was necessary to protect State sovereignty. Appendix B, pp. 6, 11, 12. Thus, it is plain that Paterson believed that the legislature of a government operating directly as the people, such as a State, must be apportioned according to population.

David Brearly of New Jersey agreed with Paterson that equal representation of States was required if the Confederation was to be continued, as he desired,

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[4] Paterson is referring to a proposal of David Brearly of New Jersey that, if the Confederation is to be ended, the States should be abolished, new States should be formed with equal population, and representation in the legislature should be the same for each State (Appendix B, p. 7).

and that representation by population was permissible only if a national government were formed (Appendix B, p. 7):

> If the states still remain sovereign, the form of the present resolve is founded on principles of injustice. He then stated the comparative weight of each state—the number of votes 90. Georgia would be 1, Virginia 16, and so of the rest. This vote must defeat itself, or end in despotism. If we must have a national government, what is the remedy? Lay the map of the confederation on the table, and extinguish the present boundary lines of the respective state jurisdictions, and make a new division so that each state is equal—then a government on the present system will be just.

The next delegate cited by the *amici* (Br. 29), Roger Sherman of Connecticut, first proposed the compromise that the Senate be equally apportioned among the States and the House of Representatives be apportioned by population. He explained the former as an effort to protect State sovereignty (Appendix B, p. 9):

> * * * as the people ought to have the election of one of the branches of the legislature, the legislature of each state ought to have the election of the second branch, in order to preserve the state sovereignty; and that each state ought in this branch to have one vote.

The speech in which Alexander Martin of North Carolina states that he feared domination by the populous States begins by suggesting that the new government must be a continuation of the Confederation (Appendix B, p. 16):

> [The States] entered into the confederation on the footing of equality; that they met now to to [sic] amend it on the same footing, and that he could never accede to a plan that would

> introduce an inequality and lay 10 States at the mercy of Va. Massts. and Penna.

Gunning Bedford, as we have seen (pp. 63–64), based his argument for equal representation of States on his view that the "confederacy of the States," in which each State is sovereign, must be continued.

Oliver Ellsworth of Connecticut supported the Connecticut compromise. He based this position explicitly on the ground that the new government must be a mixture (Appendix B, pp. 30–31):

> We were partly national; partly federal. The proportional representation in the first branch was conformable to the national principle & would secure the large States agst. the small. An equality of voices was conformable to the federal principle and was necessary to secure the Small States agst. the large. * * * The existing confederation was founded on the equality of the States in the article of suffrage: was it meant to pay no regard to this antecedent plighted faith.

Ellsworth later repeated essentially the same remarks. Appendix B, pp. 32–33.

Numerous other framers made similar statements at the Philadelphia convention and the State ratifying conventions. See the government's brief in the Maryland case, pp. 75–79. The *amici* can cite only one statement in response—that by Nathaniel Gorham to which we referred earlier (pp. 66–67). This statement, in the face of overwhelming contrary evidence, cannot be taken as the sense of the convention. In short, the fact that many of the framers wanted to limit the democracy contained in the new constitution is irrelevant. The fact is that the basis of apportionment was no part of this effort. Those who wanted to give the States equal representation in the whole legislature or one house did so because they believed

the new government must continue the sovereignty of the States.

3. The *amici* Attorneys General contend (Br. 30) that the States, at the time of the convention were not truly sovereign. They cite only one statement at the convention in support of this argument. Rufus King of Massachusetts said that "[t]he States were not 'sovereigns' in the sense contended for by some" and specified various limitations on their sovereignty. I Farrand 323. However, he went on to admit that the States were in some respect sovereign (*id.* at 324):

> If the States therefore retained some portion of their sovereignty, they had certainly divested themselves of essential portions of it. If they formed a confederacy in some respects—they formed a Nation in others.

Moreover, King was a vigorous proponent of representation based on population for the whole legislature. See Appendix B, p. 35. Indeed, he was willing to continue the fight even after Madison agreed to the compromise. Appendix B, pp. 58–59. King therefore desired to minimize State sovereignty. But his view was rejected as to one house of the legislature by those who believed that substantial State sovereignty existed and should be continued.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 307

MABEL V. ROMAN, Clerk of the Peace for New Castle County; WALTER A. HANDSBERRY, Clerk of the Peace for Kent County; I. ROBERT WILLEY, Clerk of the Peace for Sussex County; *et als., Appellants,*

v.

RICHARD SINCOCK, *et als.*

On Appeal from the United States District Court for the District of Delaware

APPELLANTS' REPLY BRIEF

This reply brief enables us to develop more fully than was possible earlier significant materials bearing on the proper interpretation of the Equal Protection Clause. It also permits us to draw attention to such of the assertions made by Sincock *et als.* and by the Solicitor General as seem most imperatively in need of immediate correction.[1]

[1] We use the following additional designations:

"Del. Br." refers to our brief in chief.

"Pl. Br." refers to the brief of Sincock *et als.*

"Pl. App." refers to the record appendix printed by Sincock *et als.*

"U.S. Br. *A.C.*," without more refers to the brief *amicus curiae* filed on behalf of the United States in the present case.

"U.S. Br. *A.C.*," followed by a number, refers to the brief *amicus curiae* on behalf of the United States in the other State reapportionment cases so numbered.

Of course we shall strike only at the essentials; the present cause is too momentous for debating points, even if we had the time to make them.

The pages that follow will accordingly concentrate on the two most serious and basic errors of our opponents.

The first of these is the all-out effort of Sincock *et als.*, joined by the United States as *amicus curiae*, to read into the five words "equal protection of the laws" personal preferences, postulates for constructing governments, and blueprints for the distribution of political power within a community, that not only cannot be found in those words, that not only lack support in those words, but that represent precisely the contrary of what those who penned those words nearly a century ago said publicly that the words meant.

There are, of course, vast areas of constitutional law where our experiences and evolution over more than 170 years have given to the several clauses of the Constitution meanings that the Framers could not possibly have foreseen.

As Mr. Justice Holmes said for the Court in *Missouri* v. *Holland*, 252 U.S. 416, 433,

> "* * * when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago."

Nevertheless, in no situation of which we are aware, has there ever been a decision where, without the injection of

new factors, this Court has ever construed any part of the Constitution to mean just precisely the opposite of what its framers intended. Even in *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U.S. 398, where the Minnesota mortgage moratorium law was sustained under the Contract Clause, the Court was at pains to note the additional factors that had been injected into what had earlier been the narrow question of the impairment of a private contract. Chief Justice Hughes said (p. 442)

> "Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends."

Here, however, we are dealing with the distribution of political power within a State. In that area there are no new factors; all of the relevant elements—town against country, older communities against newer settlements, the few against the many, the rich against the unpropertied—every one of those competing factors within a political unit is as old as America itself.

Consequently, when our opponents urge the Court to find in the Equal Protection Clause the precise opposite of what its draftsmen said it contained, and to effect such a drastic reversal virtually as an original proposition, after an interval of nearly a century during which the issue was never deemed capable of judicial determination, they are asking the Court to sit, not as a super-legislature nor even as Council of Revision, but as "a Convention for proposing Amendments" (U.S. Const., Art. V) which shall be empowered not simply to propose but actually to effect the most drastic amendments, not gradually, not in the light

of long judicial experience, but suddenly and radically and with an effect that very substantially curtails, for the first time, the powers of the several States over the structure of their own governments.

We content ourselves with saying that there is, happily, no precedent for such action.

The second basic error of our opponents is that they ask the Court to take this drastic step, and to strike down the 1963 amendment to the Delaware Constitution as violative of the refinements that they are reading as constitutional absolutes into the Equal Protection Clause, in a literal vacuum—for, as the briefs of Sincock *et als.* and of the United States show, its counsel have never stopped or troubled to examine the proceedings of the Committee that formulated the 1963 amendments (Def. Ex. 1, Del. App. 100a-339a).

We had supposed that, in examining any plan for apportionment or reapportionment to determine whether (*Baker* v. *Carr*, 369 U.S. 186, 226) "a discrimination reflects *no* policy, but simply arbitrary and capricious action," the first prerequisite would be to review the reasons for such plan, and that in the absence of such a review it would be arbitrary and capricious to denounce a particular result as arbitrary and capricious simply because it did not meet the examiners' preferences.

Yet our opponents have done precisely that. They assail the plan contained in the 1963 amendment to the Delaware Constitution, but without examining in even the most cursory fashion the reasons, the carefully and precisely articulated reasons, that underlie its provisions. Their approach presents, we fear, what in this delicate area of the relationship of the States to the Nation can only be characterized as a rather terrifying example of "Don't bother me with facts, I have already made up my mind."

Otherwise stated, our opponents condemn the 1963 Delaware amendment under the Equal Protection Clause, by closing their eyes to what is contained in the first, and by seeing in the second what never was there.

The major headings below follow those of our brief in chief; the subheadings vary from those earlier presented.

I. THE FEDERAL ANALOGY OF AREA REPRESENTATION IN THE SENATE OF THE UNITED STATES IS FULLY AND EXACTLY APPLICABLE IN DELAWARE, WHERE COUNTIES WERE NEVER CREATURES OF THE STATE, BUT WHERE, TO THE CONTRARY, THE STATE WAS CREATED IN SEPTEMBER 1776 BY THE THEN EXISTING SOVEREIGN THREE LOWER COUNTIES

Neither Sincock *et als.* nor the United States question our detailed recital of the process whereby the Three Lower Counties upon Delaware became "The Delaware State." They differ only as to the inferences to be drawn from the Delaware history we have recited, and both argue primarily that the Federal analogy that we have invoked is actually not analogous.

First. Sincock *et als.* assert (Pl. Br. 39-40) that the Three Lower Counties were always united until the State was formed, and constituted a unitary government. That they called themselves a "Government" and a "Colony" (Del. Br. 44-45) is clear, but after June 15, 1776, when they threw off the royal yoke and with it the Proprietor who represented the Crown, they were linked together only in an Assembly—and that link was a tenuous one indeed, for no less an authority than Lord Mansfield had ruled (Del. Br. 37-39) that "their Legislative Authority * * * will not yet bear a strickt Examination."

Consequently, when independence came, each of the Three Lower Counties was sovereign, a point on which

the experts for both sides agreed at the trial (Mr. deValinger, Del. App. 28a; Prof. Hanson, Tr. 287, quoted at Del. Br. 48, note 8).[2] True, they were joined in a loose confederacy, but the terms of the compact were plainly far less formal and precise than those that bound the United States of America under the Articles of Confederation (Del. Br. 48-49, 51); and if the United States could in 1787 properly effect compromises in the terms of their representation in the legislature of the new union after having been independent and loosely allied since 1776, so the Three Lower Counties could treat with each other as sovereigns when they formed The Delaware State—even though in the latter situation their unlimited sovereignty lasted only three months and not thirteen years.

Second. But, it is argued (Pl. Br. 38, 42-43; U.S. Br., *A.C.*, 52, note 25), whatever may have been the case originally, the counties of Delaware after September 1776 lost their sovereignty, and have had their governmental powers whittled down over the years. Hence, it is contended, there is now no basis for giving to each county equal representation in the Delaware Senate.

We think the obvious answer is that, just as "The Great Compromise" of the Federal Convention arrived at in 1787, when there were only thirteen small States on the Atlantic seaboard, was given renewed effect only a very few years ago, when Alaska with its minuscule population was admitted on an equality with New York and California and all the rest, so the arrangements of the Convention of the Delaware State of 1776 (Del. Br. 44-47), when the Three Lower Counties merged their sovereignty into that of the new State, could and should be given effect today to sustain equal county representation in the Delaware senate.

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[2] The quotation from Mr. deValinger's testimony (Del. App. 21a) that Sincock *et als.* set forth at Pl. Br. 41, note 15, does not bear on this issue.

True, as the United States says (U.S. Br., *A.C.*, 52, note 25), "The equality of representation by States in the United States Senate recognized that the new government was in part a construction of the old confederation of sovereign States." That is why the Great Compromise prevailed. But Alaska, which plainly was not able to threaten to walk out (as one of Delaware's delegates did in 1787, see Sen. Sumner's speech quoted at Del. Br. 120-121)—Alaska, the least populous of all, whose voice in the Senate of the United States dilutes by a ratio of 74 to 1 the voting force of any citizen who lives in New York or California (Del. Br. 91), was admitted as a State in 1959. And, when admitted, the erstwhile Territory, an area that had no independent sovereignty (cf. *Grafton* v. *United States*, 206 U.S. 333, 354-355), that had only a voteless Delegate in the House, and that was subject to the unconsented regulation of Federal officers (*Metlakatla Indians* v. *Egan*, 369 U.S. 45), became the largest state in area but the smallest in population—and still obtained the two Senators agreed upon by the Framers in 1787.

There is, accordingly, just as much reason for county sovereignty in Delaware in 1776 to carry through in 1963 as there was for State sovereignty under the Articles of Confederation in 1787 to carry through in 1959 and 1960.

Third. Sincock *et als.* contend, however, that (Pl. Br. 43) there is no analogy, and the Solicitor General speaks (U.S. Br., *A.C.*, 30) of "the obviously false analogy to the United States Senate," because, he says, the Delaware House is not apportioned according to population, and because Delaware's Senators do not represent any one county at large—as indeed they did through 1897, see Del. Br. 16—but instead represent merely districts within the several counties (U.S. Br., *A.C.*, 13-14, 49-50). Hence, it is said (U.S. Br., *A.C.*, 13), "The Delaware legislature is constituted upon a radically different basis from the fed-

eral Congress, and the apportionment results in gross discrimination that the federal system has never created."

These objections are demonstrably untenable.

To begin with, the purpose of the framers of the 1963 amendment to the Delaware Constitution was to make the reapportionment of the House conform to population, see Point III, *infra*, a purpose impossible of attainment because of the time pressure imposed by the court below, but a purpose which the proposal of the Bipartisan Committee's second report would have effectuated (Del. Br. 107-108; see the Appendix hereto, *infra*, pp. 68 *et seq.*

Next, up to now no member of the court below or anyone else so far as we are aware has ever suggested that it is a prerequisite to a State's adoption of the Federal pattern for its legislature that each member of its upper house represent a political subdivision at large rather than a portion of that subdivision.

We had supposed that the principal objection to the apportionment of the Delaware Senate effected in 1963 was that, again because of the pressure of time, the existing Senatorial districts had been continued. That was also the view of the Bipartisan Committee, which reported a bill to equalize the Senatorial Districts in each County, a bill that passed the Senate unanimously on the very day that the Circuit Justice stayed the injunction theretofore issued in this case (Del. Br. 107-108; Point IV, *infra*, pp. 58-59); for the text, see the Appendix hereto, *infra*, pp. 68 *et seq.*).

Finally, the Solicitor General's assertion (U.S. Br., *A.C.*, 13) that Delaware's 1963 apportionment results in gross discrimination that the federal system has never created, is simply contrary to the fact: The disproportion under the 1960 census between New Castle County as against Sussex County and Kent County in the Delaware Senate

is, respectively, 4.2:1 and 4.68:1, whereas the disproportion between the four least populous States as against New York in the Senate of the United States under the same census is 74:1 for Alaska, 58:1 for Nevada, 50:1 for Wyoming, and 43:1 for Vermont. See Del. Br. 91 and the qualification there noted in footnote 16.

Fourth. It is argued by the United States (U.S. Br., *A.C.*, 13-14) that the question of the Federal analogy is not raised by the decree of the district court, "which merely adjudicates the unconstitutionality of the present apportionment," and (*id.*, 58) that while the district court "indicated guidelines for testing the constitutionality of a State legislature apportionment in its opinion, they are not part of the order."

Sincock *et als.* also argued, in their Brief in Support of the Motion to Affirm (pp. 2, 12-13, 14-18, 22), that the issue of the Federal analogy was not in the case, a contention that was dealt with at some length in our opposition to that motion.

But perhaps a few words will suffice to explain why the issue of the Federal analogy is still inescapably in this case, assuming the soundness of the holding below that the 1963 apportionment is invalid.

1. The legislature might have equalized the Senatorial Districts within each county, as it started to do (Del. App. 107-108; Appendix, *infra*, pp. 69-74).

2. The legislature might have followed the Solicitor General's suggestion that the Federal analogy is applicable only when the Counties as a whole are represented, and have provided for the election of the seven senators at large within each county.

Unless it can be said with assurance that either of those plans would have satisfied the district court, assurance that all too plainly no one who has read the opinions be-

low (J.S. App. A16-A67) can give, the question of the Federal analogy permeates this case, and any assertion to the contrary is simply unreal and indeed inaccurate verbalization.

The basic question for decision, accordingly, is whether anything in the Equal Protection Clause forbids a State from patterning its legislature on the Federal model. To that we turn.

II. ADOPTION BY A STATE OF THE FEDERAL PLAN FOR THE COMPOSITION OF ITS LEGISLATURE, WHEREBY ONE HOUSE IS APPORTIONED BY POLITICAL SUBDIVISIONS RATHER THAN BY POPULATION, DOES NOT NOW, AND AS DEMONSTRATED BY CONTEMPORANEOUS LEGISLATION NEVER DID, VIOLATE THE EQUAL PROTECTION CLAUSE

A. Florida was readmitted notwithstanding objection based on the circumstance that her 1868 Constitution favored sparsely-settled counties over populous ones.

In its brief here, the United States asserts (U.S. Br., *A.C.*, 52-53):

> "Congress did not even advert to the problem of apportionment in readmitting the Southern States. For, at that time, unlike at the time of the adoption of the original Constitution and again during the last few decades, apportionment was not an issue of major importance. There is no way to know whether, if the issue had been squarely posed, Congress would have considered that the equal protection clause applied to apportionment of State legislatures at all and, if it did, what standards were appropriate."

And, further (U.S. Br., *A.C.*, 54):

> "At most, the history shows that some deviations from *per capita* representation in the readmitted States provoked no objections. There is no evidence that Congress knew of them; nor that it knew whether they were large or small."

Similarly, Sincock *et als.* assert (Pl. Br. 58):

> "If an inferred contemporaneous construction of equal protection yields anything, it provides more support to the idea of equality of persons in representation than to the assumption that it somehow condoned malapportionment."

The fact, the easily demonstrable fact, is otherwise. There was specific objection to the readmission of Florida on the ground that its 1868 Constitution gave control of the Florida legislature to its sparsely settled counties, and this objection failed, so that Florida was readmitted notwithstanding.

We pointed out in our brief in chief (Del. Br. 59-60) that although the discrepancy in voter strength between the several Florida counties under Art. XIV of that State's 1868 Constitution was on the order of 73.7 to 1, the only question raised in the Senate when Florida's new Senators presented themselves was whether Florida had complied with the condition imposed on its readmission by "adopting" rather than "ratifying" the Fourteenth Amendment.

We also pointed out (Del. Br. 115, 121-122) that the Senate had added Florida to the list of States eligible for readmission and that the House after some discussion had concurred in that and other Senate amendments. We failed, however, to note the significant exchange that follows.

When the Senate version was returned to the House for concurrence in its amendments, Mr. Farnsworth of Illinois moved to strike out Florida (Cong. Globe, 40th Cong., 2d sess., p. 3090). He said (pp. 3090-3091):

> "I am thoroughly convinced that Florida ought not to be readmitted to representation in Congress with its present constitution.
>
> * * * * * *
>
> "There are many other things of which, if I had time, I would like to speak. I might refer to the appor-

tionment of representatives. By this constitution representatives in the legislature of Florida are apportioned in such a manner as to give to the sparsely-populated portions of the State the control of the Legislature. The sparsely populated parts of the State are those where they are very few negroes, the parts inhabited by the white rebels, the men who, moving in from Georgia, Alabama, and other States, control the fortunes of their several counties. By this constitution every county in that State is entitled to a representative. There are in that State counties that have not thirty registered voters; yet, under this constitution, every one of those counties is entitled to a representative in the Legislature; while the populous counties are entitled to only one representative each, with an additional representative for every thousand inhabitants."

Mr. Butler of Massachusetts, in reply to this and other objections, answered as follows (p. 3092):

"All these arguments, all these statements, all the provisions of this constitution have been submitted to the Judiciary Committee of the Senate, and they have found the constitution republican and proper. This constitution has been submitted to the Senate, and they have found it republican and proper. It has been submitted to your own Committee on Reconstruction, and they have found it republican and proper, and have reported it to this House."

On a vote (p. 3097), the amendment to strike out Florida from the bill lost by 45 to 99, with 45 not voting; the Nays on this proposition included such architects of Reconstruction as Mr. Butler of Massachusetts, Mr. Bingham of Ohio, and Mr. Thaddeus Stevens of Pennsylvania. None of these, very obviously, considered the malapportionment of which Mr. Farnsworth had complained to constitute a denial by Florida of the equal protection of the laws to the citizens of its more populous counties, in violation of the Fourteenth Amendment that Florida had so

solemnly "adopted" as a prerequisite to readmission into the Union.

This vote is even more significant in the present connection by reason of the circumstance that it was Mr. Bingham who actually wrote the Equal Protection Clause—indeed, he drafted all of the second sentence of Section 1 of the Fourteenth Amendment in precisely its present language. See Point IIC, pp. 24-36, *infra*.

What this Court said in *United States* v. *Florida*, 363 U.S. 121, of this very Florida Constitution bears repetition (pp. 125-127; footnotes omitted):

> "The Government argues, however, that these readmission enactments did not contemplate and Congress did not make a general scrutiny of all the provisions of the state constitutions, but only that the constitutions had been duly adopted and were republican in form. The Government makes many references to debates which indicated that some Senators and Congressmen were satisfied with such a limited examination of the constitutions. Florida, on the other hand, points out many other remarks which indicated a much closer examination of the state constitutions.
>
> "It is beyond doubt that the proposed constitutions were printed, then read, discussed, and amended in the Congress. For instance, the very 1868 bill that admitted Florida's congressional representatives contained a proviso rejecting certain parts of the Georgia Constitution. That at least some Congressmen scrutinized the constitutions to see if amendments were necessary is persuasively shown by the remarks of Congressman Thaddeus Stevens, set out below. Mr. Stevens was Chairman of the all-important Joint Committee on Reconstruction, and, because of his leading role as architect of the reconstruction plan finally adopted and carried out by Congress, has appropriately been called 'the Father of the Reconstruction'.
>
> "The voluminous references to the Reconstruction debates fail to show us precisely how closely the Southern States' Reconstruction Constitutions were ex-

amined. We cannot know, for sure, whether all or any of the Congressmen or Senators gave special attention to Florida's boundary description. We are sure, however, that this constitution was examined and approved as a whole * * *.

Language to the contrary is quoted at Pl. Br. 47-48, note 18. But, although Sincock *et als.* do not disclose the fact, they are there quoting from the dissenting opinion in *United States* v. *Florida*, 363 U.S. 121, 136 *et seq.*

In this connection, also, we cannot forbear to remark that since we are dealing with what the 40th Congress did, and said and knew and had available to it, there can be no possible basis for judging the deeds of that Congress, as the brief of the United States does, on the basis of the 1870 census, simply (U.S. Br., *A.C.*, 55) "because the Civil War caused significant relocation of population." The legislators of 1868, however wise and foresighted we may now consider them, had available to them only the figures of the 1860 census; their eyes could not pierce the veil of the future.

B. The decision below in this case disregards the central holding of Baker v. Carr, namely, that any plan of apportionment with a rational basis satisfies the Equal Protection Clause regardless of a court's personal preferences for a different plan.

We turn to the core of this Court's holding in *Baker* v. *Carr*, which is this (369 U.S. 186, 226):

> "Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action."

Accordingly, the problem is to ascertain from the decisions of this Court just what are the "well developed and familiar" standards for applying the Equal Protection Clause.

First. Two clauses in Section 1 of the Fourteenth Amendment, the Due Process Clause and the Equal Protection Clause, have received differing answers over the years. Both clauses are vague, no doubt of convenient vagueness, as befits constitutional commands general in terms. Their very generality has evoked opposite judicial responses.

One such response, similar in cases involving both clauses, has involved reading into "due process of law" as well as into "equal protection of the laws" a rigidly circumscribed meaning that turned the courts into super-legislatures. The other response, again found in cases construing both clauses, has left responsibility for unwise or ill-considered legislation with the legislatures, holding unconstitutional only those measures that very plainly transgressed constitutional limitations.

The first approach, initially reflected in Mr. Justice Field's dissent in the *Slaughter-House Cases*, 16 Wall. 36, 83, reached its first apogee in *Allgeyer v. Louisiana*, 165 U.S. 578, where Mr. Justice Peckham spoke for the Court, and, preeminently, in the ill-fated bakeshop case, *Lochner v. New York*, 198 U.S. 45, where, once again, Mr. Justice Peckham spoke for the majority. Following a period of dormancy, this view attained a new flowering in the 1920s and early 1930s, reaching a second but shortlived climax in *Morehead* v. *Tipaldo*, 298 U.S. 587.

The second approach was originally that of Mr. Justice Miller in the *Slaughter-House Cases* and of Chief Justice Waite in *Munn* v. *Illinois*, 94 U.S. 113. Thereafter its exponent was Mr. Justice Holmes, and his views, at least more often than not, prevailed until about 1921. Later still, the Field-Peckham doctrine assumed the ascendancy once

more, and this second view was then reflected only in dissents, notably by Mr. Justice Holmes and Mr. Justice Brandeis.

Finally, with *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, the tide turned, let us hope for the last time, so that the Holmes-Brandeis views are now the law of this Court and the law of the Constitution. The recent reaffirmation of this change in constitutional climate has been so recently reviewed in *Ferguson* v. *Skrupa*, 372 U.S. 726, that detailed documentation is unnecessary. But the interpretation placed on the Equal Protection Clause by the court below in this case, an interpretation so very different from that expounded by the most distinguished adherents of what has now become the prevailing view, suggests the appropriateness of recalling what those judges—and others—have said, so that we may have before us the "well developed and familiar" "[j]udicial standards under the Equal Protection Clause" that are at the very heart of *Baker* v. *Carr*, 369 U.S. 186, 226.

Four such standards are reflected in the opinions of those whose constitutional views of the Fourteenth Amendment have now prevailed.

First—and foremost—is the admonition that the constitutional limitations imposed by that Amendment are neither coextensive with nor to be measured by a court's own policy preferences.

The first opinion that Mr. Justice Holmes wrote for this Court involved the Equal Protection Clause. What he said then is apposite—startlingly apposite—for the problem now presented for decision. Here are his words on that occasion (*Otis* v. *Parker*, 187 U.S. 606, 608-609):

> "But general propositions do not carry us far. While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of

> morality with which they disagree. Considerable latitude must be allowed for differences of view, as well as for possible peculiar conditions which this Court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus.*"

And, a little later, again speaking for the Court in an Equal Protection Clause case, he voiced another caution that also has application here (*Missouri, K. & T. R. Co.* v. *May*, 194 U.S. 267, 270):

> "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

For a time, as we have noted, these views were the views of the Court. Thus, in *McLean* v. *Arkansas*, 211 U.S. 539, 547, an Equal Protection Clause case, Mr. Justice Day said this for the Court:

> "The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power."

Again, in a Due Process case from the same volume of reports, Mr. Justice Moody in a celebrated case said for the Court (*Twining* v. *New Jersey*, 211 U.S. 78, 106):

> "In approaching such a question [i.e., of due process of law] it must not be forgotten that in a free representative government nothing is more fundamental than the right of the people, through their appointed

> servants, to govern themselves in accordance with their own will, except so far as they have restrained themselves by constitutional limits specifically established, and that, in our peculiar dual form of government, nothing is more fundamental than the full power of the state to order its own affairs and govern its own people, except so far as the Federal Constitution, expressly or by fair implication, has withdrawn that power."

Shortly thereafter, in one of his most celebrated expositions of the proper limits of the Due Process Clause, Mr. Justice Holmes, speaking for the Court, said (*Noble State Bank* v. *Haskell*, 219 U.S. 104, 110):

> "In answering that question [i.e., whether the statute deprives the plaintiff of property without due process of law], we must be cautious about pressing the broad words of the 14th Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the lawmaking power."

Just prior to the First World War, as we have pointed out, Mr. Justice Holmes' views of the Fourteenth Amendment won acceptance from all of his brethren. Thus, in March 1916, Mr. Justice McKenna, speaking for a unanimous Court in an Equal Protection case, said this (*Tanner* v. *Little*, 240 U.S. 369, 385):

> "As to what extent legislation should interfere in affairs political philosophers have disputed and always will dispute. It is not in our province to engage on either side, nor to pronounce anticipatory judg-

ments. We must wait for the instance. Our present duty is to pass on the statute before us, and if it has been enacted upon a belief of evils that is not arbitrary we cannot measure their extent against the estimate of the legislature."

A few years later, the climate of constitutional opinion changed sharply, and views such as the foregoing found expression only in dissenting opinions. Here are two dissents by Mr. Justice Holmes written in the Nineteen Twenties, the first from a case involving the Equal Protection Clause, the second from one turning on the Due Process Clause.

> "If the 14th Amendment were now before us for the first time I should think that it ought to be construed more narrowly than it has been construed in the past. But, even now, it seems to me not too late to urge that in dealing with state legislation upon matters of substantive law we should avoid with great caution attempts to substitute our judgment for that of the body whose business it is in the first place, with regard to questions of domestic policy that fairly are open to debate." *Schlesinger* v. *Wisconsin*, 270 U.S. 230, 241.

> "I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the state, and that courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular court may happen to entertain." *Tyson & Bro.* v. *Banton*, 273 U.S. 418, 446.

There are those who assert that since all of the foregoing passages dealt with social and economic legislation, the principles therein expounded have no application here, where "Civil Rights" (M/A 20) and "civil liberties" (U.S. Br., *A.C.*, No. 29, p. 66) are involved. We have already (Del. Br. 83-87) dealt with the fallacies of that argument. But we think it well to recall another observa-

tion by Mr. Justice Holmes, speaking for the Court, that pinpoints our opponents' basic error (*American Bank & Trust Co.* v. *Federal Reserve Bank*, 256 U.S. 350, 358):

> "But the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified."

The *second* standard for proper construction of the Fourteenth Amendment is that its generalized commands should not be interpreted so as to halt experiments by the several States. Here the controlling passages are in dissent, from the period of the Nineteen Twenties and early Nineteen Thirties when the Field-Peckham philosophy temporarily held sway.

Dissenting in *Truax* v. *Corrigan*, 257 U.S. 312, an Equal Protection case decided in 1921, Mr. Justice Holmes said (pp. 342, 344):

> "The dangers of a delusive exactness in the application of the 14th Amendment have been adverted to before now. * * * Delusive exactness is a source of fallacy throughout the law.
>
> * * * * *
>
> "There is nothing that I more deprecate than use of the 14th Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect."

In 1932, after Mr. Justice Holmes retired, the Court decided *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, a Due Process case. Mr. Justice Brandeis' dissent to that decision has become a classic of the law. We set forth its concluding paragraph (285 U.S. at 311), here, because it

so precisely points up just what it is that the court below in this case has done:

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. * * * But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold."

The *third* principle is that the Fourteenth Amendment is not to be construed so as to overturn what has been long settled; on that point we have, initially, opinions of the Court by Mr. Justice Holmes, the first in a Due Process case, the second in one construing the Equal Protection Clause.

> "Again, we cannot wholly neglect the long settled law and common understanding of a particular state in considering the plaintiff's rights. 'We are bound to be very cautious in coming to the conclusion that the 14th Amendment has upset what thus has been established and accepted for a long time.'" *Otis Co.* v. *Ludlow Mfg. Co.*, 201 U.S. 140, 154.

> "If the 14th Amendment is not to be a greater hamper upon the established practices of the states in common with other governments than I think was intended, they must be allowed a certain latitude in the minor adjustments of life, even though by their action the burdens of a part of the community are somewhat increased. The traditions and habits of centuries were not intended to be overthrown when that Amendment was passed." *Interstate Consol. St. R. Co.* v. *Massachusetts*, 207 U.S. 79, 87.

Acquiescence is particularly significant in matters involving the exercise of political rights—here, the right of a State to construct its legislature on the Federal pattern, a practice that goes back before the Federal Constitution itself. New Jersey, for instance, has had a bicameral legislature with an upper house apportioned on a county basis since 1776. See brief of N.J and 13 other States, No. 29, p. 4. That being so, what Chief Justice Hughes said for the court in *Smiley* v. *Holm*, 285 U.S. 355, 369, takes on added significance here:

> "General acquiescence cannot justify departure from the law, but long and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning. This is especially true in the case of constitutional provisions governing the exercise of political rights and hence subject to constant and careful scrutiny."

Indeed, both views expressed in *Snowden* v. *Hughes*, 321 U.S. 1, negative completely the notion, explicit in the holding below, that the Equal Protection Clause now suddenly prohibits a State from modeling the structure of its legislature on the Federal pattern.

Chief Justice Stone, for the Court, said (321 U.S. at 11):

> "Where discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights. * * * But the necessity of a showing of purposeful discrimination is no less in a case involving political rights than in any other. It was not intended by the Fourteenth Amendment and the Civil Rights Acts that all matters formerly within the exclusive cognizance of the states should become matters of national concern."

The dissenting justices (Douglas and Murphy, JJ.) said (321 U.S. at 17-18):

> "I agree that the equal protection clause of the Fourteenth Amendment should not be distorted to make the federal courts the supervisor of the state elections.

> That would place the federal judiciary in a position 'to supervise and review the political administration of a state government by its own officials and through its own courts' (*Wilson* v. *North Carolina*, 169 U.S. 586, 596)—matters on which each State has the final say."

We recur to the seminal passage in *Baker* v. *Carr*, 369 U.S. 186, 226, with which we began;

> "Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action."

Tested by those standards as they have been interpreted by our wisest judges over the years, there is nothing in the Equal Protection Clause that forever calcifies into rigid and immutable constitutional commands the "principles" and the "postulates" representing personalized utopias for ideal political structures that were presented to this Court in the course of the arguments in the other State reapportionment cases last month.

Certainly there is nothing in the Equal Protection Clause that supplies the "basic principles" that are expounded on behalf of the United States in this case (U.S. Br., *A.C.*, 32-43) and that were argued as well in the other State reapportionment cases last month. Refinements on that order represent considerations of desirability and reflect preferences that can only be read into the Equal Protection Clause. They are not commands that can be found there.

Those who urge the Court to write such preferences into the Equal Protection Clause as constitutional absolutes are not only asking that the standards just reviewed be jettisoned and abandoned, they are asking that the Court regress to the now rejected approaches of its most tragic era, some of which have just been catalogued only to be newly rejected in *Ferguson* v. *Skrupa*, 372 U.S. 726.

C. The very words of the Constitution caution against resting too elaborate a structure of voting rights on the Equal Protection Clause

Much has been read into the five words, "equal protection of the laws," in the briefs filed against us in this case, as well as in the briefs supporting broad plans for reapportioning in the other State cases. Very plainly, the cause of action in this and in the other reapportionment cases is based upon the Equal Protection Clause. *Baker* v. *Carr*, 369 U.S. 186, 237. But, up to now at any rate, there has been little if any study of that Clause with a view to ascertaining how far it can support the burden that the arguments of our opponents seek to build upon it.

In the course of the arguments in the other State reapportionment cases last month, one member of the Court asked, in substance, "Has the Equal Protection Clause anything to do with voting rights at all?" That question was never answered directly. Accordingly, we shall supply an answer now.

First. The legislative history of the Fourteenth Amendment shows rather plainly that it was not intended to grant either any right of suffrage nor indeed to affect the right of suffrage in any way.

The principal author of what is now the Fourteenth Amendment was Congressman John A. Bingham of Ohio (Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 30), whose amendment in the nature of a substitute was couched in terms that are now found word for word in Section 1 of the Fourteenth Amendment (*id.* at 42-43):

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Yet Mr. Bingham said specifically that Congress could not under that provision regulate suffrage in the several States (Cong. Globe, 39th Cong., 1st sess., pp. 2542-2543; italics added):

"* * * The necessity for the first section of this amendment to the Constitution, Mr. Speaker, is one of the lessons that has been taught to your committee and taught to all the people of this country by the history of the past four years of terrible conflict. * * * There was a want hitherto, and there remains a want now, in the Constitution of our country which the proposed amendment will supply. What is that? It is the power in the people, the whole people of the United States by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do and have never even attempted to do, that is to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every citizen within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State. Allow me, Mr. Speaker, in passing to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right under the forms of law or otherwise to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic although many of them have assumed and exercised the power and that without remedy. *The amendment does not give as the second section shows the power to Congress of regulating suffrage in the several States.*

"*The second section excludes the conclusion that by the first section suffrage is subjected to congressional law;* save indeed with this exception that as the right of the people in each State to a republican government and to choose their representatives in Congress is of the guarantees of the Constitution by this amendment a remedy might be given directly for a case supposed by Madison, where treason might change a State government from a republican to a despotic government and thereby deny suffrage to the people. * * * That great want of the citizen and stranger,

protection by national law from unconstitutional State enactments, is supplied by the first section of this amendment. That is the extent it hath, no more; and let the gentlemen answer to God and their country who oppose its incorporation into the organic law of the land."

And in the Senate, Senator Howard of Michigan said the same thing (p. 2766):

"But, sir, the first section of the proposed amendment does not give * * * the right of voting. The right of suffrage * * * is merely the creature of law. It [is] * * * not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves * * *."

Second. The earliest judicial interpretations of the Equal Protection Clause emphasize its narrow scope. Thus, in the *Slaughter-House Cases*, 16 Wall. 36, Mr. Justice Miller said this for the Court (p. 81):

"In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of law in the states where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.

"If, however, the states did not conform their laws to its requirements, then by the 5th section of the article of amendment Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. But as it is a state that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its

> power or some case of state oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands. We find no such case in the one before us, and we do not deem it necessary to go over the argument again, as it may have relation to this particular clause of the Amendment."

So, in *Strauder* v. *West Virginia*, 100 U.S. 303, holding invalid under the Equal Protection Clause the trial of a Negro pursuant to a State statute rendering Negroes ineligible for jury duty, this Court said, speaking through Mr. Justice Strong (pp. 306-308):

> "This is one of a series of constitutional provisions having a common purpose, namely: securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the Amendments, as we said in the *Slaughter-House Cases*, 16 Wall., 36, cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that state laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that, in some States, laws making such discriminations then existed, and other might well be expected. The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the 14th Amendment was framed and adopted. It was designed to assure to the colored race the en-

joyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the General Government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation.

* * * * *

"If this is the spirit and meaning of the Amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers. It ordains that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States (evidently referring to the newly made citizens, who, being citizens of the United States, are declared to be also citizens of the State in which they reside). It ordains that no State shall deprive any person of life, liberty or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the Amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored; exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."

* * *

As the United States said in its Supplemental Brief on Reargument in the School Segregation Cases (*Brown* v.

Board of Education, and related cases, Nos. 1, 2, 4, 8, 10, Oct. T. 1953, p. 119):

> "The studies which have been made in preparing this brief have only served to confirm the accuracy of the contemporary historical observations made in the *Slaughter-House* and *Strauder* opinions by members of this Court who themselves had lived during the period when the Amendment was adopted. The great events of the Reconstruction period were still fresh in their minds, and required for them no elaborate investigation into recondite historical materials."

Third. The terms of the Fifteenth Amendment and the fact that its enactment was deemed necessary—indeed, its ratification was imposed as a condition of readmission upon four former Confederate States—join in showing that the Equal Protection Clause did not of its own force guarantee or grant voting rights.

Section 1 of the Fifteenth Amendment provides:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States *or by any State* on account of race, color, or previous condition of servitude—"

The words that we have italicized would be surplusage if the Fourteenth Amendment that prohibited a State from denying to anyone within its jurisdiction the equal protection of the laws had by reason of that language standing alone given to Negroes the right to vote. Moreover, if the Equal Protection Clause had of its own force guaranteed to the former slave a substantive right to equality in voting power, why should Congress have insisted that any former Confederate State ratify the Fifteenth Amendment in addition to the Fourteenth as a prerequisite to readmission to representation in Congress following the establishment of military government under the Reconstruction Act (Del. Br. 56-57)?

Yet that is precisely what Congress did. By Section 6 of the Act of April 10, 1869, c. 17, 16 Stat. 40, 41, it was provided that Virginia, Mississippi, and Texas would not be admitted to representation in Congress until their several legislatures ratified the Fifteenth Amendment. And, by Section 8 of the Act of December 22, 1869, c. 3, 16 Stat. 59, 60, Congress similarly provided that Georgia's Senators and Representatives would not be seated in Congress until the Georgia legislature similarly ratified the Fifteenth Amendment.

Those conditions, it can easily be demonstrated, were imposed because without the ratification of those four States the Fifteenth Amendment would not become a part of the Constitution.

That Amendment was proposed on February 27, 1869 (15 Stat. 346). There being then 37 states in the Union, the votes of 28 were necessary for ratification. If New York's withdrawal of ratification was ineffective, ratification was completed by Iowa; if effective, by Nebraska two weeks later. Up to 1871, 31 States ratified the Amendment; but if Georgia, Virginia, Mississippi and Texas had not been pushed into ratification by the Acts of Congress that have just been cited, the Fifteenth Amendment would not at that period have become effective.[3]

This Court, likewise, recognized that the Fifteenth Amendment provided something more than the Fourteenth (*Minor* v. *Happersett*, 21 Wall. 162, 175):

> "And still again, after the adoption of the fourteenth amendment, it was deemed necessary to adopt a fifteenth, as follows: [quoting it.] The fourteenth

[3] The details of the votes on ratification of the Fifteenth Amendment appear in *The Constitution of the United States of America* (Sen. Doc. 49, 87th Cong., 1st sess., p. 31), as well as in the more elaborate annotated document, *The Constitution of the United States of America: Analysis and Interpretation* (Sen. Doc. 170, 82d Cong., 2d sess., p. 47).

> amendment had already provided that no State should make or enforce any law which should abridge the privileges or immunities of citizens of the United States. If suffrage was one of these privileges or immunities, why amend the Constitution to prevent its being denied on account of race, &c.? Nothing is more evident than that the greater must include the less, and if all were already protected why go through with the form of amending the Constitution to protect a part?"

Not until *Nixon* v. *Herndon*, 273 U.S. 536, which struck down a Texas statute that specifically enacted that "in no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas," is there any suggestion that such discrimination in voting was unlawful under the Fourteenth rather than the Fifteenth. As the Court there said (pp. 540-541) citing the *Slaughter-House Cases* and *Strauder* v. *West Virginia*, "We find it unnecessary to consider the Fifteenth Amendment because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth. That Amendment, while it applies to all, was passed, as we know, with a special intent to protect the blacks from discrimination against them."

Sincock *et als.* tender assertions that badly confuse the differing scope of the Fourteenth and Fifteenth Amendments.

Thus, they commence their argument by saying (Pl. Br. 29) that "The Fourteenth Amendment protects a voter's right to cast a ballot without unfair impairment or invidious discrimination in the exercise of suffrage"—but two out of the three cases that they cite, *Smith* v. *Allwright*, 321 U.S. 649, and *Terry* v. *Adams*, 345 U.S. 461, are Fifteenth Amendment cases pure and simple.

They say further (Pl. Br. 56):

> "Since 1868, states were admitted which maintained segregated school systems. Closer to the point here,

> Constitutions containing the grandfather clause for suffrage qualifications were approved. Congressional acceptance of the original constitution did not save it from later challenge under the Fourteenth Amendment or other provisions of state constitutions."

We deal with the school problem under our Point IIE below. Here we point out only that the foregoing passage is egregiously wrong both as a matter of chronology and as a statement of constitutional law.

1. In 1868, the Fifteenth Amendment had not yet been formulated; indeed, as we have just shown a few pages back, it was not even submitted to the States for ratification before February 1869!

2. The earliest grandfather clause dated from 1890. See Monnet, *The Latest Phase of Negro Disenfranchisement*, 26 Harv. L. Rev. 42. None was in the constitutions that Congress so carefully, see *United States* v. *Florida*, 363 U.S. 1, examined in 1868.

3. When the grandfather clause was ultimately struck down by this Court, reliance was had solely on the Fifteenth Amendment. *Guinn* v. *United States*, 238 U.S. 347; *Myers* v. *Anderson*, 238 U.S. 368. Neither opinion so much as mentions the Fourteenth Amendment.

Fourth. The terms of the Nineteenth Amendment similarly show that in denying to the States the right to deprive citizens to vote on grounds of sex, it was imposing a restriction not imposed by the Equal Protection Clause of the Fourteenth.

The first sentence of the Nineteenth Amendment reads:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States *or by any State* on account of sex."

Here again, if the Equal Protection Clause or any other part of the Fourteenth Amendment had saved women from

discrimination in respect of the right to vote, the long campaign to propose and then to ratify the Nineteenth Amendment would have been completely unnecessary.

That proposition is supported by a square holding here, *Minor* v. *Happersett*, 21 Wall. 162, affirming 53 Mo. 58.

There the Constitution of Missouri limited the right to vote to male citizens. Mrs. Minor, relying on the Fourteenth Amendment as well as on the Guaranty Clause (R. 4, No. 182, Oct. T. 1874), sought to compel the registrar of elections to enroll her as a voter. Defeated in the Missouri courts, she came here, arguing (Br. for Appellant, p. 40) that "A citizen disenfranchised is a citizen attainted; and this, too, in the face of the fact, that you look in vain in the great charter of government, the Constitution of the United States, for any warrant or authority for such discrimination. To that instrument she appeals for protection."

But her appeal to the Constitution and her writ of error directed to the court below were equally without avail; a unanimous Court held that, despite her undoubted citizenship, neither the privileges and immunities clause of the Fourteenth Amendment nor the Guaranty Clause of Article IV, Section 4, conferred upon her any right to vote.[4]

Significantly enough, although *Minor* v. *Happersett* was litigated in the early Eighteen Seventies, when Reconstruction was still a vivid memory, at a time before the essential Federal military support of the new Southern

[4] The statement in *Baker* v. *Carr*, 369 U.S. at 223, note 48, that in *Minor* v. *Happersett* "the question was whether a government republican in form could deny the vote to women," is only partially correct, inasmuch as the Court also considered and rejected Mrs. Minor's contentions under the Fourteenth Amendment.

The final ruling in *Minor* v. *Happersett*, 21 Wall. at 178, that "the Constitution of the United States does not confer the right of suffrage upon anyone," was disavowed in *Ex parte Yarborough*, 110 U.S. 651, 664.

State governments had been withdrawn, counsel for Mrs. Minor in their brief did not mention the Equal Protection Clause, much less invoke it, and this Court's opinion similarly did not make the slightest reference to the Equal Protection Clause.

Otherwise stated, lawyers and judges whose mature professional years were contemporary with the drafting, adoption, submission, ratification, and initial interpretation of the Fourteenth Amendment never considered that its Equal Protection Clause conferred upon any one the bare right to cast a ballot, much less that it conferred upon a voter a right to be protected against "dilution" or "debasement" of his vote under any system of legislative apportionment then in force.

Some of the passages in the brief filed here on behalf of the United States similarly read into the Fourteenth Amendment much that the fact of passage of the Fifteenth and Nineteenth proves not to have been there originally. Thus it is said (U.S. Br., *A.C.*, 36-37),

> "The thrust of the Fourteenth Amendment is toward the elimination of all class distinctions in the exercise of political and other civil rights. There are no qualifications under the equal protection clause. It has general application."

And again (*id.*, 43),

> "The Fourteenth Amendment guarantees * * * equality before the law defining the opportunities for participation in self-government."

Some allowance must of course always be made for forensic hyperbole, particularly in documents composed under the pressure of demanding deadlines. None the less, we think that every lawyer who had had in mind either the Fifteenth Amendment, or *Minor* v. *Happersett*, 21 Wall. 162, or the Nineteenth Amendment, or indeed any one of those three, would have phrased the quoted passages much more narrowly.

Fifth. The materials adduced above were not before the Court in *Baker* v. *Carr*, where the battle raged over justiciability and over what was comprised within an admitfedly non-justiciable political question.

In the past, this Court has always been ready to vary, indeed to overrule, its earlier decisions, as additional and more precise historical materials came to light. See *Vidal* v. *Girard's Ex'rs*, 2 How. 127, qualifying *Baptist Ass'n* v. *Hart's Ex'rs*, 4 Wheat. 1, on the basis of additional data concerning the early practice of the English Chancery; *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 72-73, overruling *Swift* v. *Tyson*, 16 Pet. 1, in large measure on Mr. Charles Warren's researches into the history of the First Judiciary Act; *Nye* v. *United States*, 313 U.S. 38, 47-48, which overruled *Toledo Newspaper Co.* v. *United States*, 247 U.S. 402, on the basis of historical research into the Peck impeachment in 1831.

We do not ask that *Baker* v. *Carr* be reconsidered—or even limited. We accept it fully and ungrudgingly; indeed we ask that it be applied as written, with particular reference to the "well developed and familiar" standards under the Equal Protection Clause (369 U.S. at 226), standards to which we have ourselves appealed (Point IIB, *supra*), and which the court below so egregiously disregarded.

Rather, we bring to the Court's attention the materials bearing on the contemporaneous construction of the Equal Protection Clause, by the Congress, by the States that ratified the Fifteenth Amendment, and by this Court, in order to point out why it is that this Clause cannot serve to support the elaborate structure of personal political preferences that permeates the opinion below and that is sought to be rested thereon by our opponents.

The draftsman and principal proponent of the Fourteenth Amendment assured his colleagues that his proposal did not affect suffrage in the several States, and all con-

cerned acted on that assurance by drafting, submitting and requiring the ratification of the Fifteenth Amendment. This Court held squarely that the Fourteenth Amendment did not confer upon women any right to vote; such a right, except where some of the States provided otherwise, had to await the Nineteenth Amendment. Yet the court below in the present case held (J.S. App. A51-A53) that the Equal Protection Clause set a limit of 1½:1 as the largest permissible variation between representative districts, and that this Clause was violated in Delaware by a ratio of 2:1 between Senate districts.

We will not deny for a moment that the smaller disparity is more desirable; indeed, the Delaware Reapportionment Committee's later proposals (Del. Br. 107-108 Appendix, *infra*, pp. 73, 78) specifically provide for the 1½:1 ratio.

What we say is that, when attention is focused on the original scope of the Equal Protection Clause, a scope that was crystal clear to contemporaries, who without expressed dissent viewed it as narrow indeed; once it is recalled that the broader voting rights that are axiomatic today stem from the Fifteenth and Nineteenth Amendments, rather than from the Fourteenth, it will become apparent that the district's court's exercise in arithmetical proportions to which we have just referred cannot possibly be rested on or drawn from the Equal Protection Clause; and that, necessarily, there is similar lack of support in that clause for the "principles" and the "postulates" that our opponents and those allied with them ask this Court to erect into constitutional absolutes.

D. Neither Baker v. Carr nor Gray v. Sanders even purported to decide whether a State could apportion one house of its legislature on an area basis on the Federal pattern

The actual holding in *Baker* v. *Carr* was very narrow (369 U.S. at 197-198):

> "* * * we hold today only (a) that the court possessed jurisdiction of the subject matter; (b) that a justiciable

> cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) because appellees raise the issue before this Court, that appellants have standing to challenge the Tennessee apportionment statutes."

Nothing more was decided, as Mr. Justice Stewart emphasized in concurring (369 U.S. at 265 and 266), and as Mr. Justice Clark similarly emphasized when in his concurrence he criticized the Court's opinion for not giving more guidance than it did (369 U.S. at 251 and 261).

Obviously, therefore, the Court in *Baker* v. *Carr* decided nothing whatever concerning the constitutionality or otherwise of a Federally-patterned State legislature, much less just how analogous that Federal analogy was required to be.

Nor was that question decided by anything in *Gray* v. *Sanders*, 372 U.S. 368; indeed, the point was expressly and explicitly reserved (p. 376; italics added):

> "This case, unlike *Baker* v. *Carr*, *supra*, does not involve a question of the degree to which the Equal Protection Clause of the Fourteenth Amendment limits the authority of a State Legislature in designing the geographical districts from which representatives are chosen either for the State Legislature or for the Federal House of Representatives. Nor does it include the related problems of *Gomillion* v. *Lightfoot*, 364 U.S. 339, where 'gerrymandering' was used to exclude a minority group from participation in municipal affairs. *Nor does it present the question, inherent in the bicameral form of our Federal Government, whether a State may have one house chosen without regard to population.*"

None the less, in answer to our demonstration that Congress contemporaneously construed the Fourteenth Amendment as not to prohibit area apportioned State Senates with disparities running as high as 5.2:1 and 5.7:1 (Del.

Br. 55-71), the United States asserts (U.S. Br., *A.C.*, 37) that—

> "The constitutions of the States readmitted to the Union after the enactment of the Fourteenth Amendment were all before the Court in *Baker* v. *Carr*, * * * for Mr. Justice Frankfurter developed essentially the same arguments in this dissenting opinion in an effort to show that the Amendment is not concerned with legislative apportionment (369 U.S. 186, 266, 315-317). The Court found the history unpersuasive * * *."

And, again (*id.*, 54),

> "The history that appellants invoke was all brought to the Court's attention in *Baker* v. *Carr* by the dissenting opinion of Mr. Justice Frankfurter. The argument was rejected."

Very plainly, the additional materials that we have adduced in this reply brief—the statements by Mr. Bingham and Senator Howard regarding the scope of the Fourteenth Amendment, the vote in the House that refused to strike Florida from the readmission bill because her legislature was malapportioned, the light that the very adoption of the Fifteenth and Nineteenth Amendments throw on the scope of the Fourteenth, the Fourteenth Amendment aspect of *Minor* v. *Happersett*, 21 Wall. 162—none of those materials were before the Court in *Baker* v. *Carr*. Indeed, neither of the briefs filed by the United States as *amicus curiae* in *Baker* v. *Carr* so much as cited *Minor* v. *Happersett*.

In any event, on the assumption that *Baker* v. *Carr* has irrevocably determined that the Fourteenth Amendment *is* concerned with legislative apportionment, that case plainly did not determine "whether a State may have one house chosen without regard to population"— nor did *Gray* v. *Sanders*, 372 U.S. 368, 376, from which we take those words.

Certainly nothing in *Baker* v. *Carr* rejected the notion, to which our historical materials drawn from Congressional action in the Reconstruction period were primarily di-

rected (Del. Br. 55-71), that States were entirely free under the Fourteenth Amendment to apportion one house of their legislature without regard to population. Even to intimate that this is the holding of *Baker* v. *Carr* is to indulge in the most wishful kind of misreading.

We suggested above, Point IIC, that *Baker* v. *Carr* will not support a too elaborate structure of voting rights. We say here, what must be plain from the opinion in *Baker* v. *Carr*, that it decided nothing as to the merits or demerits of any particular plan of apportionment, other than perhaps the "crazy quilt." And we repeat what we think we have already demonstrated beyond any possible doubt, that the Congresses nearest in time to the adoption of the Fourteenth Amendment saw no constitutional infirmity in the constitution of any State that apportioned one house of its legislature by areas and counties rather than by population.

E. Nothing in Brown v. Board of Education is authority for the construction of the Equal Protection Clause that Sincock et als. and the United States now ask the Court to place upon it

Both of our opponents place considerable reliance on *Brown* v. *Board of Education*, 347 U.S. 483. Sincock *et als.* say (Pl. Br. 51) that the decision there "is perhaps the best illustration of the hazards and general disutility of contemporaneous construction," while the Solicitor General, citing the same decision (U.S. Br., *A.C.*, 53), says that "this Court long ago made it clear that the protection afforded by the Fourteenth Amendment cannot be limited by historical research into the conscious intent of its framers."

These passages not only misread the decision but also misunderstand the technique that the Court there applied.

Here is the heart of what this Court said in connection with the historical materials (*Brown* v. *Board of Education*, 347 U.S. at 489-490, 492-493; our italics):

"Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the States, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. *At best; they are inconclusive.* . . .

. . . . . .

"An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time. In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. . . . As a consequence, *it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.*

. . . . . .

"In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy* v. *Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws."

Now, very plainly, that is not the present case.

For one thing, malapportionment was nothing new on the American scene; it was complained of in 1868 just as it is complained of today, as the discussion over Florida's readmission, Point IIA, *supra*, plainly discloses; and today no new factors, except perhaps the factor of degree, have been injected into the problem.

For another, the Reconstruction Congress *was* concerned about schools, as the conditions imposed on the readmission of Virginia, Mississippi, and Texas show (Del. Br. 64-65).

One of the "fundamental conditions" imposed on Virginia was this: "Third, That the constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution of said State" (16 Stat. at 63). Identical conditions were imposed on Mississippi (16 Stat. at 68) and Texas (16 Stat. at 81).

And in *Brown* v. *Board of Education* the United States summed up its researches as follows (Supp. Br. for the U.S. on Reargument, 76):

> "In sum, therefore, the debates on the readmission of the Southern states into the Union fail to disclose any definite understanding as to the effect of the Fourteenth Amendment on school segregation, but it is of some significance that none of the State constitutions submitted to and approved by Congress as being 'in conformity with the Constitution of the United States in all respects' [the language of § 5 of the first Reconstruction Act of March 2, 1867, 14 Stat. 428, 429] provided for segregated schools."

This essential inconclusiveness should be contrasted with the materials on legislative apportionment:

First, the draftsman of the second sentence of Section 1 of the Fourteenth Amendment, Mr. Bingham of Ohio, stated specifically that State suffrage was not affected thereby, and Senator Howard of Michigan said that Section 1 of the proposed amendment did not give the right of voting. Point IIC, *supra*. That is not inconclusive.

Second, Florida was not excluded from readmission because her constitution placed control of her legislature in the sparsely-settled counties. Point IIA, *supra*. That is not inconclusive.

Third, South Carolina and Georgia were readmitted although in their area-apportioned Senates there were discrepancies in voting rights on the order of 5.2:1 and 5.7:1, respectively. Del. Br. 55-71. That is not inconclusive.

Fourth, the Fifteenth Amendment was proposed, and thereafter it was required to be ratified as a prerequisite to readmission by the four former Confederate States that were still unrepresented in Congress when that Amendment was submitted. Point IIC, *supra*. That is not inconclusive.

Fifth, this Court's decision in *Minor* v. *Happersett*, 21 Wall. 162, showed that the Fourteenth Amendment did not give women citizens any right to vote. Point IIC, *supra*. That is not inconclusive.

This series of events points clearly in only one direction. It shows, first, that the Fourteenth Amendment was never considered to confer the right to vote, and it shows, second, that State constitutions with area-apportioned senates were considered to be perfectly consistent with its terms.

We think it also shows, third, that in the latter respect Sincock *et als.* and the Solicitor General join in urging this Court to rewrite the Equal Protection Clause to mean precisely the opposite of what by common understanding it meant at the beginning.

What they ask is not construction; what they ask is amendment of the Constitution by fiat.

III. THE APPORTIONMENT OF THE DELAWARE GENERAL ASSEMBLY EFFECTED BY THE 1963 AMENDMENT TO THE DELAWARE CONSTITUTION IS ENTIRELY CONSISTENT WITH WELL-SETTLED INTERPRETATIONS OF THE EQUAL PROTECTION CLAUSE

Delaware's present apportionment, the one made by the 1963 amendment to its Constitution, is roundly denounced here by our opponents.

Sincock *et als.* call it "Haphazard, Crazy-Quilt" (Pl. Br. 59), "deny the existence of any pattern of apportionment for the Delaware General Assembly" (*ibid.*), assert that "There is No Reasonable Basis" therein (Pl. Br. 61) and that "The Defendants Can Offer No Rhyme or Reason for

the Gross Inequalities in the Representation" (Pl. Br. 37), and attack it in varying forms of phrase (Pl. Br. 59-65).

The Solicitor General sounds the same note. His Point II is that "The Delaware apportionment creates gross discrimination among voters without a rational foundation in policy." He asserts under that point (U. S. Br., *A.C.*, 27) that the Delaware officials "offer no explanation of the gross discrimination in representation", and that (*id.*, 30) the plan contains a "disingennous effort". Under Point III (*id.*, 43) he asserts that "we can discover *no* policy to support the caprcious discriminations in the appointment of both branches of the Delaware legislature." Under Point IV (*id.*, 45), he refers to "gross inequalities," and, moving to a climax, he concludes (*id.*, 49) that "the apportionment of both houses of the Delaware legislature is a crazy-quilt, having neither rhyme nor reason."

Inasmuch as the plan that is denounced in the foregoing terms was not the consequence of legislative apathy, of legislative inertia, nor of disregard by the legislature of the command of the State's fundamental law, factors that were indeed present in *Baker* v. *Carr*, 369 U. S. 186, but represents an affirmative act designed to meet affirmatively the requirements of *Baker* v. *Carr*, namely, an amendment to the Delaware Constitution passed by two successive General Assemblies with a general election intervening, as the Delaware Constitution requires (Art. XVI, § 1; J. S. App. A76), these are most serious charges for the Solicitor General of the United States to make against a State of the Union.

We should have supposed that, as an essential preliminary to an understanding of the apportionment plan effected by the 1963 amendment to the Delaware Constitution (J.S. App. A77-A81), there would first have been studied in detail the proceedings of the body that drafted this amendment, the Bipartisan Committee. Those proceedings are summarized in the testimony of its chairman, Mr.

Houston Wilson (Del. App. 51a-97a), and are set forth verbatim in Def. Ex. 1 (Del. App. 77a-78a, 100a-339a).

But neither in the brief of the United States as *amicus curiae* nor in the brief of Sincock *et als.* is there a single reference to a single page of the Committee's proceedings to support the criticisms and characterizations made in both concerning the plan that the Committee drew up.

Accordingly, we shall briefly summarize those proceedings.

By way of preliminary, we may note that anyone who examines the account of the Committee's deliberations will at once be struck by the similarity between the work of that group and the work of the Federal Convention that framed the Constitution of the United States, whether regard is had to the full *Records of the Federal Convention*, edited in three volumes in 1911 by Professor Max Farrand, or to the latter's synopsis, published two years later as *The Framing of the Constitution*. There is the same step by step progression, the same central crisis, the same solution of that crisis through a spirit of concession, the same quickening in tempo as the completed document takes shape, and the same ultimate unanimity joined with the same realization of the finished work's imperfections. Perhaps the most striking difference is that, unlike the far more famous and important meetings at Philadelphia in 1787, the Delaware Committee that met in 1962 admitted the public (Del. App. 58a, 82a), recorded its proceedings verbatim and published them immediately, and its members consulted their constituents in the intervals between meetings (Del. App. 124a-125a, 127a, 166a, 179a, 192a, 198a-199a, 248a).

1. *Background and Membership of the Delaware Bipartisan Committee on Reapportionment.* The record makes it abundantly clear that the Bipartisan Committee was appointed to meet the threat posed by the present action, which had been brought on June 5, 1962 (J.S. App. A14).

This is clear from the minutes (Del. App. 102a, 173a). The membership appears to have been selected by July 5 (Del. App. 92a-93a), and it held three meetings, on July 12, 17, and 21 (Del. App. 100a, 163a, 254a). It made its report on July 23 (Del. App. 63a). As we have pointed out elsewhere, the court below on July 25 stayed the present proceedings, but only in part, until August 7 (J.S. App. A1-A6).

The Committee was composed of 8 members, four from New Castle County, with two of those representing the City of Wilmington and two rural New Castle County; and with two members each from Kent and Sussex Counties. Each territorial unit was represented by one Democrat and one Republican. Six of the eight members were lawyers. (Del. App. 52a, 55a-56a, 85a, 100a, 109a.) Notwithstanding the Committee's geographical and political diversity, its final report was unanimous (Del. App. 83a, 94a, 338a-339a).

2. *The Committee's Basic Premises.* Examination of the record of the Committee's proceedings reflects the basic premises upon which it proceeded in drafting what became the 1963 reapportionment amendment to the Delaware Constitution; we list those premises below.

First, lawyer members of the Committee had made a careful study of the several opinions in *Baker* v. *Carr* (Del. App. 79a-80a, 114a-117a). They were concerned with endeavoring to extract guidelines from that decision (Del. App. 110a, 112a, 116a), and in consequence had studied other apportionment rulings from State and lower Federal courts (Del. App. 79a, 110a-114a, 119a-120a, 205a-206a, 271a-272a).

Second, the Committee was fully aware that its task was to draw a line (Del. App. 112a) "between a rational plan on the one hand, and an invidious discrimination on the other." The proceedings reflect an appreciation that, the greater the deviation from mathematical equality, the more necessary it was to have "a good, sound reason for doing this" (Del.

App. 119a), and that "any crazy quilt for which there isn't any foundation or any rationale will not be upheld" (Del. App. 138a). The proceedings are full of discussions pressing one point or another on the footing that it was rational and did not represent merely a political whim (Del. App. 138a, 205a-206a, 209a, 210a-211a), and, on the other hand, of questions asking how particular discrepancies could possibly be defended (Del. App. 152a, 204a, 216a). Similarly, members were acutely aware of the undesirability of any elections at large (Del. App. 239a-240a, 276a, 285a-286a).

Third, the Committee felt very strongly that it was infinitely more desirable for the necessary reapportionment to be effected by the people through their legislature, i.e., by amendment of the Delaware Constitution pursuant to the terms of that instrument, than by the decree of a Federal court (Del. App. 102a, 173a-174a, 176a-177a, 188a-189a, 195a).

Fourth, the Committee was aware that its plan had to be palatable to the body to which the amending process is committed under the Delaware Constitution, the State's General Assembly, and that there was no utility in recommending a plan that had no practical hope of passage (Del. App. 108a-109a, 136a, 158a-159a, 168a, 206a, 210a, 217a, 226a, 227a, 237a, 247a, 266a, 269a). The Committee recognized that any plan that it presented would need to be fair and acceptable to all four groups in the General Assembly, the Democrats, the Republicans, the Upstaters, and the Downstaters (Del. App. 168a).

Fifth, the Committee realized fully that its task was to persuade the district court that the State of Delaware was proceeding in the best of faith (Del. App. 187a, 190a, 328a-329a), and that, if the State did not reapportion itself, it risked reapportionment by Federal court order (Del. App. 103a, 240a, 273a).

Sixth, the Committee was acutely aware of the pressure being exerted by the district court in the present action. As

one Committee member who represented the Delaware election officials below put it (Del. App. 104a), "* * * they are going to be very firm in the matter * * * and expect something to be accomplished."

Later comments were stronger in tone; we quote some representative formulations: "* * * how close is the gun to our back?" (Del. App. 114a); "the 'Sword of Damocles' which is hanging over the State of Delaware" (Del. App. 129a); "the litigation in a sense being the gun at our back" (Del. App. 136a); "the legislature * * * are directly under the hammer to do something now" (Del. App. 185a); "we are literally staring down the barrel of a Federal order" (Del. App. 190a); "our legislature * * * with a gun pointed right at them" (Del. App. 192a); "they are squarely under the gun" (Del. App. 199a).

Awareness was general that the district court would not wait until 1965 (Del. App. 186a, 187a, 270a), as indeed that court held when, four days after the Committee's last session, it granted a partial stay of the present proceedings until only August 7, 1962 (J.S. App. A1-A6).

Seventh, the Committee was unable to propose an ideal plan because the time available to it precluded any real redistricting or redrawing of boundaries within any of the three counties (Del. App. 150a, 209a-210a, 226a, 251a, 269a, 283a, 293a). As put by the Chairman (Del. App. 177a), "In a very real sense of the word, we are grasping for a hurried solution." See also Del. App. 182a, 240a, to the same effect.

3. *The Committee's Thirteen Step-by-Step Resolutions.* The record shows that the Committee proceeded step by step, in logical fashion, to formulate a rational plan for reapportioning the Delaware General Assembly. Each one of these steps, of which there were thirteen here pertinent, won the unanimous approval of all the members; and at the close of the last meeting, the plan was unanimously approved as a whole (Del. App. 338a-339a).

By way of preliminary, the Committee expressed a preference for the Federal pattern as the basic plan for the Delaware legislature (Del. App. 107a, 112a-113a, 121a-122a). To implement that preference, three motions were unanimously adopted, as follows:

One, the Committee voted for a bicameral legislature (Del. App. 122a).

Two, the Committee voted for a Senate apportioned on a rational geographical basis (Del. App. 122a-124a).

Three, the Committee voted for equal county representation in the Senate (Del. App. 130a, 145a).

In view of the likelihood of population increases in the near future, the Committee then voted unanimously, *Four*, to retain the existing Senatorial Districts (Del. App. 145a-150a). As has been noted, the time available did not permit the drawing of new boundaries for such districts (Del. App. 150a, 209a-210a, 226a, 283a, 293a).

The problem of allocating the two additional senators to Kent and Sussex Counties, required under *Three* above, was felt to be a problem for those counties alone (Del. App. 250a).

There were three possibilities (Del. App. 255a-256a): Elect both at large, elect both partly at large, or realign the entire county. It was unanimously voted, *Five*, to select the second alternative, dividing Sussex County between east and west (Del. App. 258a).

Six, the same plan was also unanimously adopted for Kent County (Del. App. 259a-260a). There was some question whether the division there should be horizontally or longitudinally (Del. App. 258a-259a), but in the end the same east-west division provided in Sussex County was adopted, again unanimously (Del. App. 290a-291a).

We should add a word of explanation here, in view of the confusion that appears to have arisen from the absence

of any map in the record (U. S. Br., *A.C.*, 28-29, 44) concerning these divisions.

The floterial Senatorial Districts in both Kent and Sussex Counties (§§ 2 and 3, J. S. App. A78-A79) are based on existing Representative Districts as those are established by Art. II, § 2, of the 1897 Constitution (J. S. App. A74-A75). The line separating the Kent County floterial districts runs from north to south three-quarters of the distance down the county and then turns east to the ocean, while the Sussex County dividing line starts at the ocean at the boundary between Milford and Lewes Hundreds, and runs first west and then almost due south. Admittedly both lines are easier to visualize on a map than to describe verbally.

The problem of the House of Representatives proved more difficult; it involved several complex factors.

On the one hand, the factors making for the preservation of existing Representtive Districts were (a) the impossibility of redistricting within the time available, (b) the practical difficulty in the way of asking any Representative to vote to abolish his own seat (Del. App. 206a), and (c) the strong likelihood of substantial population growth in the near future, especially in the down-State counties (Del. App. 134a-135a, 206a-207a, 210a). It was said that the fact that a particular district had not grown in ten years was without any bearing whatever on the future (Del. App. 206a), an assertion that was supported by the doubled growth of Kent County in the past decade and that was further and dramatically demonstrated in the instance of the 15th Representative District of New Castle County, Blackbird Hundred (J.S. App. A72). Although that District had not grown in 70 years (Del. App. 92a), it is now in process of absorbing a great influx of population from a new Shell Oil Co. plant (Del. App. 152a), as indeed even the district court's own reapportionment plan recognized (Ct. Ex. 4, Del. App. 98a).

On the other hand, the preservation of existing Representative District lines perpetuated existing imbalances (Del. App. 152a, 204a).

There were lengthy discussions regarding the size of the ideal Representative District, whether 12,000 or 15,000, and what to do about major fractions (Del. App. 154a-155a, 160a-163a, 218a-221a); regarding the method of dividing districts that were under-represented and the nomenclature to be used for the divisions (Del. App. 235a-236a, 263a); regarding the question of further subdivisions after each decennial census, in particular whether the historic Representative Districts should be subdivided *de novo* every ten years, or whether each of the divided districts should be treated as existing districts for the purpose of further subdivision (Del. App. 249a, 278a-282a); and regarding the desirability of placing a ceiling on the ultimate membership of the House of Representatives (Del. App. 158a-159a, 250a-251a, 325a).

After full discussion, the Committee voted unanimously, *Seven*, that an additional representaive would be allocated for each additional 15,000 population or major portion thereof in excess of the original 15,000 (Del. App. 221a-222a).

This left the question of how those additional representatives should be allocated.

Towards the close of the Committee's second meeting, a motion to allot additional representatives on the basis of redistricting the existing districts was defeated 2-5 (Del. App. 241a-243a), and another resolution to subdivide existing districts lost 3-4 (Del. App. 243a-245a).

Just before the dinner recess at the Committee's third session, a compromise was offered by a Wilmington member, namely, to let Kent and Sussex Counties retain their existing Representative Districts, provided New Castle County's existing Representative Districts were

subdivided on the basis of 15,000 or a major fraction thereof after each census (Del. App. 286a-288a). After dinner, following a relatively short discussion (Del. App. 291a, 295a-298a), this compromise step, *Eight*, was unanimously adopted (Del. App. 298a). This was the "Great Compromise" of the Delaware Reapportionment Committee of 1962.

It included a subsidiary compromise, namely, that the increases there given to New Castle County in the General Assembly would not be reflected in the composition of any future constitutional convention; a Wilmington member said he would take his chances on the convention because he was so very anxious to have one (Del. App. 295a, 299a).

Subsequent motions presented no difficulty; we list the results here; all of the votes were unanimous.

Nine, redistricting within existing Representative Districts to be effected by a Redistricting Commission consisting of the Governor and the chairmen of the two major political parties (Del. App. 302a, 305a-307a).

Ten, anti-gerrymander criteria would govern all redistricting (Del. App. 307a-314a).

Eleven, time-limits for redistricting were established (Del. App. 314a-315a).

Twelve, redistricting was made subject to judicial review (Del. App. 316a-324a).

Thirteen, redistricting was made enforceable by mandamus (Del. App. 325a-326a).

(We have purposely omitted votes regarding provisions for a constitutional convention (Del. App. 331a-336a) that failed to gain acceptance by the General Assembly as part of the 1963 amendment; see Del. App. 94a-95a.)

4. *The Committee's evaluation of its work.* Not one of the eight committeemen considered their work perfect; here

are typical comments (Del. App. 336a-338a): "I endorse the plan as a compromise. It is a step in the right direction but it is not true apportionment. * * * It is a step in the right direction." "I, in the spirit of compromise, intend to vote for the entire plan * * * the plan for reapportionment is a good plan." "I do not believe that this is the best possible plan that we might have adopted, but I believe that under the circumstances it is a good plan and should be adopted." "* * * even though I recognize * * * that we have not achieved the ideal * * * at least it is a step in the right direction and I think that succeeding groups who may have to consider this question will go in the direction of ameliorating the situation and getting closer to the ideal." "I believe the interests of the whole State of Delaware have been adequately represented and protected in these proceedings. And I further believe that the reapportionment amendment is a reasonable one * * *." "I know that I have not seen all that I would have liked to have been included in a formal report to the Governor's committee, but I feel that the work that this group has done is so permeated with a spirit of sincerity, conscientious endeavor, and statesmanship that not to vote for it would do a disservice to my fellow subcommittee members and to the Governor's committee." "It indicates more progress than we have made on this question over a period of many years."

Finally, the Chairman summed up as follows (Del. App. 338a):

> "Gentlemen, at the outset we conceived our problem to be that of coming up with a plan which was rational, which was not invidiously discriminatory. At the outset it was our responsibility to take the first step to evidence to the District Court of the State of Delaware that this State is ready to go forward in all good faith towards evolving and promulgating and making effective such a plan.
>
> "It was also our responsibility to devise a plan which we believe in our combined opinions would be

acceptable to the State as a whole, although not necessarily to each separate segment of the State. By the State I mean as it speaks through its representatives in the General Assembly.

"I sincerely believe that in the historic spirit of compromise, which is one of the fundamental principles of a Republican form of government, we have evolved such a plan as a result of our deliberations.

"I want to thank all of you for the statesmanlike spirit in which you have, each and every one, approached this problem and have come forth with this report. I shall not only vote in favor of the plan but I shall commend it to the parent body, and if called upon I will commend it to the General Assembly."

Immediately thereafter, the report in its entirety was unanimously approved (Del. App. 338a-339a).

"We call that action reasonable," said Mr. Justice Brandeis in *Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389, 403, 406, "which an informed, intelligent, just-minded, civilized man could rationally favor."

Judged by that standard, the 1963 amendment to the Delaware Constitution, which as a matter of State law (*Opinion of the Justices*, 190 A. 2d 519) is now in force, plainly passes muster, certainly when the verbatim proceedings of those who fashioned it have been examined. For those proceedings clarify and illuminate much that on the face of the amendment's text may have appeared strange, and even unreasonable. Those proceedings show the reasons behind every element and every factor of the amendment, reasons expressed contemporaneously, not formulated later as retrospective rationalizations.

The proceedings themselves, Defendants' Exhibit No. 1 at the trial, are found in three volumes that extend to 375 type-

written pages (Del. App. 78a, 339a). Only a single set of these volumes was filed with the court.

It would of course be sheerest speculation to inquire whether any of the three judges read all, or a part, or none, of these 375 pages. But it is the demonstrable fact that none of the opinions filed below following the hearing of the present cause (J.S. App. A16-A67) reflect in any degree whatever the deliberations of the Bipartisan Reapportionment Committee, or indeed show any awareness whatever of the problems that Committee faced or of the reasons why they solved these problems as they did; and it is also the demonstrable fact, already pointed out above, that not one page of the Committee's proceedings (Del. App. 100a-339a) is cited or otherwise referred to in either of the two briefs that have been filed against us.

In the light of those deliberations, we submit that only a frenetic doctrinaire could or would contend that the 1963 amendment to the Delaware Constitution (*Baker* v. *Carr*, 369 U.S. 186, 226) "reflects *no* policy, but simply arbitrary and capricious action."

Accordingly, in view of the arguments now made against our position, we are constrained to recall the words with which Mr. Justice Holmes inveighed in 1930 against reading too much into the Fourteenth Amendment. He was dealing with a State statute imposing a tax that was struck down under the Due Process Clause, but what he said (*Baldwin* v. *Missouri*, 281 U.S. 586, 595) is applicable in every respect to a State constitutional provision apportioning a legislature that, as here, has been struck down by a court of the United States under the Equal Protection Clause:

> "I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the 14th Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand I see hardly any limit but the sky to the invalidating of those rights if they happen to

> strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions. Yet I can think of no narrower reason that seems to me to justify the present and the earlier decisions to which I have referred. Of course the words 'due process of law' if taken in their literal meaning have no application to this case; and while it is too late to deny that they have been given a much more extended and artificial signification, still we ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the 14th Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass." * * *"

IV. THE DISTRICT COURT'S REFUSAL TO GIVE THE DELAWARE GENERAL ASSEMBLY SUFFICIENT TIME TO REAPPORTION THE STATE, AND ITS ISSUANCE OF AN INJUNCTION THAT PREVENTED AMENDMENT OF THE DELAWARE CONSTITUTION ACCORDING TO THE TERMS OF THAT INSTRUMENT, CONSTITUTED FUNDAMENTAL AND VITIATING ERROR

We wish preliminarily to dispose of the suggestion at Pl. Br. 76 that what was said under the present heading in our brief in chief (Del. Br. 98-110) represents only some incompletely informed views that were formulated "after another counsel has been added to the battery" (*Shibley* v. *United States*, 237 F. 2d 327, 334 (C.A. 9)). The fact is, however, that most of us who signed our brief in chief had represented the Delaware election officials at the trial below (Del. App. 11a-12a). We therefore simply add, what but for the remark at Pl. Br. 76 we should have thought unnecessary, that having affixed all of our names to that brief, as well as to this one, we subscribe to and share full responsibility for all that is said in both.

A. The record shows a continuous course of urgency, haste, and pressure on the part of the district court that is wholly at variance with the standards and approaches prescribed by this Court for litigation involving a State of the Union.

First. The facts as to urgency, haste, and pressure that are reflected in this record speak for themselves: The district court gave the Delaware Legislative just thirteen calendar days to reapportion itself before any authoritative standards for reapportionment had been laid down anywhere.

1. The apportionment of Delaware's Legislature has been constitutionally regulated since 1776, and the present Delaware Constitution provides for its amendment by two successive two-thirds votes of both houses of its General Assembly, with a general election intervening. Art. XVI, § 1, J.S. App. A76.

2. *Baker* v. *Carr* was decided on March 26, 1962, and this action was brought on June 5, 1962 (J.S. App. A14).

3. In view of the provisions of the Delaware Code, the amendatory process, in order to be accomplished by the 121st and 122nd General Assemblies (1961-1962 and 1963-1964) rather than by the 122nd and 123rd General Assemblies (1963-1964 and 1965-1966), was required to be announced by advertising by early August 1962. See J.S. App. A4-A5.

4. The district court, being unwilling to wait for a later amendment, granted a stay only to August 7, 1962. J.S. App. A1-A6.

5. This left the Governor's Bipartisan Committee on Reapportionment only about ten days to prepare its report, a period which was obviously inadequate to enable that Committee to redistrict the State so as to equalize the existing Senatorial and Representative Districts. Point III, *supra*.

6. Throughout the trial as well as in several of his opinions, the presiding judge spoke of the pressure of time and of the "box of time" (Tr. 357, 607, 608-609; J.S. App. A55, A56).

7. At the close of the trial, in his final opinion (J.S. App. A56), the presiding judge set a deadline for the General Assembly "up and to including October 1, 1963, to prepare and enact into law a reapportionment statute acceptable under the law and the guidelines we have endeavored to lay down herein."

8. After the present appeal had been noted, the district court refused to stay pending appeal the injunction (J.S. App. A69-A70) that it had earlier issued without notice or hearing.

Second. The time actually available to the Delaware General Assembly was however very substantially shorter than even the thirteen days granted by the district court, as appears from the Message of the Governor to the Special and Extraordinary Session of the Delaware General Assembly on July 27, 1962. He there said in pertinent part:

> "Unfortunately, time is short. To assure the passage of the Constitutional Amendment for reapportionment within six months, we must act promptly by providing the necessary ⅔ majority in both Houses in order that the first leg of the amendment might be approved before the three month Constitutional period before election begins to run when notice must be given in the newspapers of our three counties.
>
> "The deadline is August 6, 1962. The last date for publication of our weekly newspapers before this is Friday, August 3. Most weekly newspapers will go to press Tuesday, July 31.
>
> "Our work, if it is to be timely, must be concluded by Monday, July 30, 1962. I urge you to act promptly and courageously.

* * * * *

"Let us as dedicated public servants rise to this occasion by passing the first leg on the Reapportionment Amendment. The Federal Courts have stayed any action on the case of *Sincock* vs. *Terry*, pending the outcome of our actions here within the next two legislative days. I sincerely believe that your passage of the Reapportionment Amendment plus the passage of enabling Constitutional Amendments providing for an early Constitutional Convention will demonstrate to the United States District Court that the Delaware Legislature is acting in good faith and that we Delawareans should be given the right to complete the job of reapportioning ourselves through the passage of the final leg of these Amendments during January of 1963."

Third. Moreover, the guidelines laid down by the district court may well prove to be other than the guidelines that this Court will ultimately adopt.

1. As has been seen, Point II D, *supra*, *Baker* v. *Carr* laid down no standard for permissible apportionments beyond those implicit in the Equal Protection Clause. Consequently the district court was imposing a deadline on a State legislature that, necessarily, was sailing an uncharted sea.

2. The validity of the Federal pattern for a State legislature had been specifically reserved here on March 18, 1963 (*Gray* v. *Sanders*, 372 U.S. 368, 376), yet the district court decided that such a pattern was invalid in its opinion rendered on April 17, views that necessarily carried over into its April 30 decree (J.S. App. A68) and into its May 20 *ex parte* injunction (J.S. App. A69-A70).

3. The matter of perfecting the Federal pattern for Delaware has yet to be settled. The majority of the district court rejected that pattern *in toto*. The Governor's Bipartisan Committee (and the Delaware Senate) thought that the Federal pattern could be perfected by equalizing the Senatorial Districts within each County and the Repre-

sentative Districts throughout the State (Del. Br. 107-108; Appendix, *infra*, pp. 68-74): The Solicitor General now insists that there is no Federal pattern unless the Senators from each County are elected by the County at large (U.S. Br., *A.C.*, 13-14, 30, 49-50). Authoritative answers to these questions have not yet been formulated—but the district court set October 1, 1963, two months ago, as the Delaware General Assembly's deadline for finding those answers.

Fourth. The present situation is accordingly very different from that involved in *Watson* v. *Memphis*, 373 U.S. 526, a decision invoked by Sincock *et als.* (Pl. Br. 75-76).

That ruling came nine years after the basic desegregation decision, and eight years after a holding that "the constitutional proscription of state enforced racial segregation was found to apply to public recreational facilities." Accordingly this Court said (p. 529; italics added):

> "Thus, the applicability here of the factors and reasoning relied on in framing the 1955 decree in the second *Brown* decision, *supra*, which contemplated the possible need of some limited delay in effecting total desegregation of public schools, must be considered not only in the context of factual similarities, if any, between that case and this one, *but also in light of the significant fact that the governing constitutional principles no longer bear the imprint of newly enunciated doctrine.*"

Here, however, quite to the contrary, the guidelines for legislative apportionment are neither well settled doctrine nor even newly enunciated doctrine; they are as yet only unenunciated doctrine.

Fifth. As we have shown in detail (Del. Br. 101-103), this Court in the long and bitter *Virginia* v. *West Virginia* litigation indicated that a State of the Union is not to be treated like a simple private litigant, that even when the issue is a simple one—there, a suit seeking only a decree for the payment of money—even when the basic con-

troversy admits of little doubt—there, the obligation of West Virginia to assume her ratable share of the pre-separation pre-Civil War debt of Virginia could not fairly be questioned—even when the defendant is dragging its feet—as West Virginia assuredly was—even in such a situation, the fact that a State of the Union is involved made it appropriate for this Court to await the next session of the legislature. *Virginia* v. *West Virginia*, 241 U.S. 531.

Here, however, where everything was new, and where no single issue had been authoritatively settled, a United States District Court was intent on speed and yet more speed—and allowed the State of Delaware thirteen days to come up with answers to questions still unsolved now, sixteen months later.

That basic fact, obvious and undisputed on the face of this record, speaks for itself. Whether other courts (cf. Pl. Br. 68; U.S. Br., *A.C.*, 58) have similarly acted with undue haste, contrary to the standards laid down in *Virginia* v. *West Virginia*, simply suggests the desirability of a reaffirmation of those standards; it does not justify abandoning them, as all too plainly they were abandoned here.

B. The record demonstrates that the Delaware General Assembly was never allowed a fair opportunity to reapportion itself.

The extent of the prevailing departure from hitherto sanctioned norms governing the relationship between the Nation and the States, a relationship at the very core of our Federal system, is unhappily reflected in the extravagant denunciations with which both Sincock *et als.* and the Solicitor General belabor the Delaware Legislature for its alleged defaults.

First. The following is from the brief of the United States herein (pp. 57-58):

> "Appellants contend (Br. 98-110) that the Delaware legislature should have been given the opportunity

> to reapportion itself before the injunction was issued. The legislature had already had the opportunity. After indicating doubt about the existing Delaware apportionment, the court in a pre-trial order gave the legislature time to act. The deadline was fixed to meet the requirements of Delaware's election laws. The legislature, in response, passed a constitutional amendment at two successive sessions. [After reciting the alleged inadequacies of that amendment:] In short, the Amendment hardly constituted a serious effort by the legislature to give fair representation in either house to all the people of Delaware."

This is a stinging denunciation—but it rests on a demonstrably inaccurate factual basis.

There is not a word in the pre-trial order (Pl. App. 2a-29a) giving the legislature time to act.

The fact is that the district court gave the Delaware legislature only thirteen calendar days to act, from July 25 to August 7, 1962 (J.S. App. A1-A6), an operative period that, as we have shown, was actually very much shorter. This was nearly four months before any pre-trial conference was held. The pre-trial order was not signed until January 7, 1963 (Pl. App. 29a). Even the pre-trial conference in November that preceded the order (Pl. Br. 73) took place well after the first leg of the amending process had been completed and the form of the amendment settled. A different amendment could not have been constitutionally effected before 1965—but the district court had been unwilling to wait until 1965. And, as has been shown, Point III, *supra*, the imperfections of the 1963 amendment are directly attributable to the monstrously short deadline imposed by the district court.

Further, as we have also indicated under Point III, it is quite inappropriate for those who have not even troubled to cite a single page of the Bipartisan Reappor-

tionment Committee's proceedings to say that this Committee's work "hardly constituted a serious effort."

Second. Sincock *et als.* are even more violent in their language. They say (Pl. Br. 75, 76):

> "October 1, 1963 passed without any reapportionment. It is now the end of November, 1963. The General Assembly of the State of Delaware has been in session almost continuously for the entire year of 1963 and yet nothing tangible has resulted in the field of reapportionment. This is consistent with the futile efforts that have been made prior to the institution of this suit to effect reapportionment. In the six years prior to suit, the General Assembly of Delaware received seven bills having reapportionment as their objectives. With one exception, all failed to come out of Committee. The exception was soundly defeated (Sincock App. 18A).
>
> "The Delaware General Assembly simply will not reapportion itself and it is unrealistic to expect it to do so. Moreover, there being no initiative or referendum in Delaware, the people are without relief, absent this Court's help. It is a mockery to plead here that the District Court below had refused to give the Delaware General Assembly sufficient time to reapportion itself. The history of the inactivity of the General Assembly itself makes such statements an invention of Appellants'-counsel's wildest imagination.
>
> * * * * *
>
> "It is clear that it was the refusal of the General Assembly to accept its responsibility rather than supposed haste of the Court that has provoked the present difficulties which continue to deny the Plaintiffs their present rights under the Equal Protection Clause."

Passing the point that much of the foregoing verges on the scandalous, see this Court's Rule 40(5), since it imputes unworthy motives to the Delaware Legislature, its primary vice is that the strictures of Sincock *et als.* lack factual support.

1. It is idle to talk about the failure of the Delaware General Assembly to accept its responsibilities when no responsibility to reapportion existed prior to 20 months ago. Unlike the Tennessee situation considered in *Baker* v. *Carr*, where the legislature for over 60 years failed to comply with the mandate of the Tennessee constitution, in Delaware apportionment is and since 1776 has been a constitutional matter. The Delaware Constitution has never required the Delaware Legislature to reapportion periodically. Consequently the circumstance that the Delaware General Assembly did nothing before *Baker* v. *Carr* made apportionment justiciable is plainly not a fair basis for asserting the futility of any efforts palatable to Sincock *et als.* that had been made earlier.

2. The contention that nothing has been done in 1963 to effect reapportionment is similarly inaccurate.

The 1963 amendment, all too hastily drawn because of the constricting short time allowed by the district court, was repassed in January 1963 and became effective then (*Opinion of the Justices*, 190 A. 2d 519).

And the reason why nothing was done by the General Assembly by October 1, 1963, as required by the district court's opinion (J.S. App. A56), was not because "The Delaware General Assembly simply will not reapportion itself," to quote Sincock *et als.* (Pl. Br. 75), but rather because the district court's injunction had by then been stayed by the Circuit Justice during the pendency of the present appeal.

We have already pointed out (Del. Br. 107-109) that the General Assembly took no further steps concerning reapportionment following the granting of that stay, other than to direct the taking of the present appeal. Chapter 90, vol. 54, *Laws of Delaware*.

Do Sincock *et als.* seriously contend that the refusal of the Delaware Legislature to accept the district court's

decree as final, after the presiding judge had himself expressed a hope that the case would be brought here (Del. App. 98a), demonstrates (Pl. Br. 76) "the refusal of the General Assembly to accept its responsibility"!

3. A final word perhaps needs to be added concerning the reference by Sincock *et als.* (Pl. Br. 76) to "the present difficulties which continue to deny the Plaintiffs their present rights under the Equal Protection Clause."

We had supposed that the only issue in this litigation was whether Sincock *et als.* had any rights under that Clause, and, if so, of what extent and scope.

C. The combination of the decree and the injunction below, which effectually prevent any amendment of the Delaware Constitution according to the terms of that instrument, constitutes a gross abuse of judicial power.

Our opponents do not deny that the injunction below (J.S. App. A69-A70), had it not been stayed by the Circuit Justice, would effectually have prevented any further amendment of the Delaware Constitution pursuant to the two-stage procedure prescribed by Article XVI, Section 2, thereof (J.S. App. A76).

Instead, they say that, since Delaware's existing constitutional apportionment is invalid under their and the district court's views of the Equal Protection Clause, Delaware can and should reapportion by statute (Pl. Br. 77-79; U.S. Br., *A.C.*, 58-59).

This, indeed, was the district court's original suggestion (J.S. App. A4), a suggestion which, when not immediately adopted by the Legislature, brought on some unmistakable judicial pique (J.S. App. A15-A16). But the district court recurred to the suggestion as a command in its final opinion when it gave the Legislature until October 1, 1963, to pass a reapportionment statute (J.S. App. A56).

We think that this course transcends hitherto accepted standards governing the relationship between courts of the United States and the States of the Union. Indeed, this is so shocking an example of "blackjacking the Assembly into reapportioning the State," to use Mr. Justice Clark's phrase in *Baker* v. *Carr*, 369 U.S. at 260, that we confess surprise that the United States should support it here, as it does (U.S. Br., *A.C.*, 58-59).

We repeat, in the present case we are not dealing with any ultimate sanction, such as was considered in *Virginia* v. *West Virginia*, 246 U.S. 565, when West Virginia challenged the enforceability of the decree earlier entered against her. For what is involved here is a decree in an area where authoritative standards have yet to be laid down, not a situation where a litigant remains obdurate and recalcitrant after the quantum of his default has already been finally and conclusively determined. All too characteristically, the district court refused even to stay its injunction pending appeal.

When a high-ranking military superior makes a suggestion, he may properly expect his subordinates to treat that suggestion as a command. When anyone is dealing with an unruly child, prompt chastisement has been regarded as appropriate ever since Biblical days. But a United States court adjudicating in the first instance a whole series of constitutional issues of first impression that concern the very structure of government of a State of the Union is acting improperly, very improperly, when it assumes the role of a general or a governess.

D. The record further shows a consistent compulsion on the part of the district court to effect a reapportionment of the Delaware General Assembly by Federal judicial decree.

The contentions that we originally made under the above subheading (Del. Br. 107-110) are assailed by Sincock *et als.* as "ad hominem" (Pl. Br. 79). But, here again, the district court's actions outweigh its disclaimers.

First. The court presented its own plan for reapportionment of the Delaware House of Representatives (Ct. Ex. 4; Del. App. 98a-99a) at the pre-trial conference, and invited comments thereon from the several political science professors who testified at the trial (Del. Br. 12-13).

Second. During the course of the trial Sincock *et als.*, whose complaint prayed among other things that the district court reapportion the Delaware legislature (¶2 of Pre-trial Order; Pl. App. 3a-4a), proposed a reapportionment plan of their own (Del. Br. 13). In view of the relief they sought and of the matters they adduced appropriate to that relief, Sincock *et als.* plainly presented their plan in the hope and expectation that it would ultimately be embodied in a decree. For, after all, had they been seeking a legislative apportionment rather than a judicial one, they would have presented their plan to the legislature, not to the United States District Court. Moreover, both at the trial and in his final opinion (Tr. 737; J.S. App. A56-A57), the presiding judge declared himself quite ready to reapportion the State by decree.

In those circumstances, our demonstration of these facts of record (Del. Br. 109-110 and references there cited) plainly does not deserve to be characterized by Sincock *et als.* (Pl. Br. 80) as "a vicious and unwarranted attack upon the judges who sat below."

Third. Undoubtedly counsel for the Delaware election officials anticipated guidelines from the court for the legislature to follow (Pl. Br. 81-83; Pl. App. 73a-75a). But, very plainly, those expressions cast no light on how strongly the district court did or did not desire to assume the redistricting task.

As we have said, the district court's affirmative acts speak far more convincingly than either its disclaimers or its protestations of reluctance: The court presented a plan of its own, invited testimony thereon, invited Sincock *et als.* to present a plan, heard considerable evidence regarding that plan, and commented at length thereon in

its final opinion (J.S. App. A57-A62). These are actions consistent with, and consistent only with, a purpose to enter a Federal judicial decree reapportioning the Delaware Legislature.

CONCLUSION

For the foregoing additional reasons, we submit that the judgment below should be reversed, with directions to dismiss the complaint; or, alternatively, that the judgment be reversed with directions to stay the proceedings as prayed at Del. Br. 110-111.

Respectfully submitted.

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DECEMBER 1963.

APPENDIX

EQUALIZING PROPOSALS SUBMITTED WITH THE BIPARTISAN COMMITTEE'S SECOND REPORT

On June 19, 1963, the Governor's Bipartisan Committee on Reapportionment submitted its Second Report to the Governor, together with drafts of bills to reapportion both the Senate and the House of Representatives.

The date is important.

On that day, the injunction entered *ex parte* by the district court, forbidding any further elections to the Delaware General Assembly (J.S. App. A69-70), was in force, as was the district court's deadline of October 1, 1963, imposed on the General Assembly for passage of a reapportionment statute (J.S. App. A56-A57). Although the Delaware election officials had by then filed two notices of appeal, from the decree and from the injunction, the district court had denied their motion to stay the operation of the injunction pending appeal.

On that day, also, the present appellants filed with the Circuit Justice an application for a stay of the injunction.

While that application was pending, there was introduced in the Delaware Senate, on June 23, 1963, Senate Bill 195, designed to equalize the several Senatorial Districts.

Then, on June 27, three events took place.

1. The Senate by a vote of 12 to 0, with five absent, passed Senate Bill 195. This appears from the manuscript Journal of the Senate, which has not yet been printed.

2. House Bill 373, which provides for a similar equalization of all Representative Districts, was introduced in the House.

3. The Circuit Justice stayed the operation of the district court's injunction.

Since June 27, no further action has been taken on either bill, the texts of which appear below.

1. Senate Bill No. 195 Is as Follows:

AN ACT TO AMEND TITLE 29, PART II, DELAWARE CODE, RELATING TO THE GENERAL ASSEMBLY BY PROVIDING FOR THE COMPOSITION OF THE SENATE AND REAPPORTIONMENT THEREOF.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Title 29, Part II, Delaware Code, be, and the same hereby is, amended by adding thereto a new chapter, to read:

CHAPTER 6A. COMPOSITION OF AND REAPPORTIONMENT OF THE SENATE

§ 611. *Composition of the Senate; Staggered terms*

The Senate shall be composed of 21 members, who shall be chosen to hold office for four years. Each of the three Counties shall have seven Senatorial Districts, from each of which shall be chosen, by the qualified electors thereof, one Senator. The terms of office of the several Senators from each of the three Counties shall be staggered so that three Senators or four Senators, respectively, as the case may be, shall be alternately elected from each County at each succeeding biennial General Election.

§ 612. *The population quotient of each County for the Senate*

The total population of each County, as shown by the most recent Federal Decennial Census (currently, and following each Federal Decennial Census), shall be divided by the figure "7", and the result shall be known as the "population quotient" for the Senatorial Districts of such County.

§ 613. *Reapportionment of Senatorial Districts following each decennial census; Reapportionment Commission.*

Currently, and thereafter following each succeeding Federal Decennial Census, all the Senatorial Districts of each of the Counties shall be reapportioned and redistricted in accordance with this chapter as is hereinafter provided:

(a) The determination of the boundaries of the Senatorial Districts within each County shall be done by a Reapportionment Commission selected as follows: *provided, always*, that the persons so selected shall be the same persons as are selected pursuant to § 604 of Chapter 6 of this Title. Currently, and thereafter following each succeeding Federal Decennial Census, the State Chairman of each of the two political parties receiving the largest vote for Governor in the last preceding gubernatorial election shall each nominate 12 qualified electors, three of whom shall be residents of New Castle County outside of the City of Wilmington, three of whom shall be residents of the City of Wilmington, three of whom shall be residents of Kent County, and three of whom shall be residents of Sussex County. From among the nominees so selected by each such State Chairman, the Governor shall appoint and commission four members of a Reapportionment Commission, one each from those residents in New Castle County outside of the City of Wilmington, the City of Wilmington, Kent County, and Sussex County, respectively, making a total of eight Commissioners in all.

(b) The first order of business of such Reapportionment Commission shall be the election of a Chairman thereof, who shall not be a Commissioner and who shall be entitled to vote only in case of a tie. Any action taken by the Reapportionment Commission shall require the affirmative vote of 5 Commissioners, or, in the case of a tie, the affirmative vote of 4 Commissioners and the Chairman.

(c) A vacancy in the office of any Reapportionment Commissioner shall be filled by appointment and the commission of the Governor from among 3 qualified electors of the same geographical subdivision of the State as that of the Reapportionment Commissioner whose office shall have become vacant, who shall be nominated by the State Chairman of the same political party who nominated the Commissioner whose office shall have become vacant. A vacancy in the office of Chairman of the Reapportionment Commission shall be filled by the Reapportionment Commission itself.

§ 614. *Action by Reapportionment Commission; Approval or modification thereof; Publication of final report.*—

(a) By and with the aid of such experts and advisers as they shall require, the Reapportionment Commission shall reapportion and redistrict the seven Senatorial Districts within each County in accordance herewith, and shall deliver a separate report as to the reapportionment and redistricting of the Senate to both Houses of the General Assembly within 120 days following the effective date of this Chapter and thereafter within 120 days following the official reporting by the President of the United States of each succeeding Federal Decennial Census. If the General Assembly is not then in session, the Governor shall call it into special session to receive such report.

(b) The General Assembly, within 30 calendar days following receipt of any such report, by joint resolution of both Houses, may correct, alter, revise, amend or otherwise change, in whole or in part, any such report.

(c) If the General Assembly shall take no such action with respect to any such report within said period of 30 days, then such report shall be conclusively deemed to be the will and enactment of the General Assembly, and the Governor, within 10 days, Sundays excepted, from the ex-

piration of said period of 30 days shall approve or disapprove such report and shall forthwith advise the General Assembly in writing of his approval or disapproval. If the Governor shall fail to approve or disapprove such report within such 10 day period, or upon the express approval of the Governor, or when passed over his disapproval, such report shall be a final report and binding until the next Federal Decennial Census.

(d) If the General Assembly should correct, alter, revise, amend or otherwise change any such report, in whole or in part, as aforesaid, then such report as thus corrected, altered, revised, or amended or otherwise changed shall be conclusively deemed to be the will and enactment of the General Assembly and, upon the approval of the Governor, or, when passed over his disapproval, shall be a final report binding until the next Federal Decennial Census.

(e) A copy of each such Final Report shall then be filed with the Secretary of State, who shall cause copies thereof to be published in a newspaper of general circulation, published in each of the three Counties once a week for two consecutive weeks, within a period of 20 days after each such report became final, as aforesaid. The Secretary of State shall cause a copy of any such Final Report to be published in the next volume of the Session Laws of the State of Delaware.

§ 615. *Reapportionment and Redistricting rules for the Senate*

Each succeeding reapportionment and redistricting shall be done in conformity with the following rules:

(a) Each Senatorial District shall be formed of contiguous territory.

(b) Each Senatorial District of any given County shall be as nearly equal in population as possible to the population quotient of such County and as nearly equal in population as possible to the other Senatorial Districts through-

out the same County, any deviation therefrom to be only such as is required, as a practical matter, by the geography and mathematics of the situation and the staggering of terms of Senators.

(c) In no case should any Senatorial District of any given County be so laid out as to have a population which is more than 1½ times the population of any other Senatorial District throughout the same County.

(d) Any Senatorial District requiring no change in boundary lines by reason of change in its population quotient shall be reestablished according to its prior boundary lines with as little change therein as is practicable.

(e) Each Senatorial District shall be bounded, so far as possible, by ancient boundaries, major roads and streets, streams, existing election district boundaries, or natural boundaries other than those above suggested.

(f) Each Senatorial District shall be so created as not to favor unduly any person or political party.

(g) Senatorial Districts, including those in existence on the date that this Chapter becomes effective, as existing immediately prior to the effective date of any Final Report provided for in § 614 of this Chapter reapportioning or redistricting Senatorial Districts, shall continue to be Senatorial Districts until the expirations of the terms of the Senators then in office, except for the purpose of an election of Senators for full terms beginning at such expirations.

§ 616. *Time for Filing Mandamus or Other Proceeding.* Any mandamus or other proceeding:

(a) to compel performance of the reapportionment and redistricting duties of any Reapportionment Commission shall be filed within 60 days of the expiration of the period of time within which any Reapportionment Commission is required to act;

(b) to correct any error in any Final Report shall be filed within 60 days after the date on which any such Final Report is first published by the Secretary of State in a newspaper of general circulation.

Section 2. If the occasion should arise for the interpretation of any provision of this Act, it should be interpreted so as to effect the aims spelled out in the "Second Report of Delaware's Bipartisan Committee upon a Plan for the Reapportionment of its General Assembly and for the Convening of a Delaware Constitutional Convention" dated June 19, 1963, insofar as said report has reference to the apportionment of the Senate.

Section 3. The provisions of this Act are severable, and if any of its provisions shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions.

2. House Bill No. 373 Is as Follows:

AN ACT TO AMEND TITLE 29, PART II, DELAWARE CODE, RELATING TO THE GENERAL ASSEMBLY BY PROVIDING FOR THE COMPOSITION OF THE HOUSE OF REPRESENTATIVES AND REAPPORTIONMENT THEREOF.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Title 29, Part II, Delaware Code, be and the same hereby is, amended by adding at the beginning thereof a new chapter to read as follows:

CHAPTER 6. COMPOSITION OF AND REAPPORTIONMENT OF THE HOUSE OF REPRESENTATIVES

§ 601. *Composition of the House of Representatives*

The House of Representatives shall be composed of 45 members, who shall be chosen to hold office for two years.

The State shall be divided as hereinafter provided into 45 Representative Districts, from each of which shall be chosen, by the qualified electors thereof, one representative.

§ 602. *The population quotient for the House of Representatives*

The population of the State, as shown by the most recent Federal Decennial Census (currently and following each such census), shall be divided by the figure "45", and the result shall be known as the "population quotient."

§ 603. *Allocation of Representative Districts to Counties*

The number of Representative Districts in each County shall equal the number of whole times that the population of such County can be divided by the population quotient. But if the total number districts of all Counties, as determined by the above method, is less than 45, the County having the largest remainder from such division shall have one additional District. And if after providing for such additional District, as aforesaid, the total number of Districts is still less than 45, the County having the next largest remainder, as aforesaid, should then have one additional District, and so on until the total of all Representative Districts equals 45.

§ 604. *Reapportionment of Representaative Districts following each decennial census; reapportionment commission*

Currently, and thereafter following each succeeding Federal Decennial Census, all the Representative Districts shall be reapportioned and redistricted in accordance with this chapter as is hereinafter provided:

(a) The allocation of Representative Districts to the Counties and the determination of the boundaries of the Representative Districts within each County shall be done by a Reapportionment Commission selected as follows:

Currently, and following each succeeding Federal Decennial Census hereafter, the State Chairman of each of the two political parties receiving the largest vote for Governor in the last preceding gubernatorial election shall each nominate 12 qualified electors, three of whom shall be residents of New Castle County outside of the City of Wilmington, three of whom shall be residents of the City of Wilmington, three of whom shall be residents of Kent County, and three of whom shall be residents of Sussex County. From among the nominees so selected by each such State Chairman, the Governor shall appoint and commission four members of a Reapportionment Commission, one each from those resident in New Castle County outside of the City of Wilmington, the City of Wilmington, Kent County, and Sussex County, respectively, making a total of 8 Commissioners in all.

(b) The first order of business of the Reapportionment Commission shall be the election of a Chairman thereof, who shall not be a Commissioner and who shall be entitled to vote only in case of a tie. Any action taken by the Reapportionment Commission shall require the affirmative vote of 5 Commissioners, or, in the case of a tie, the affirmative vote of 4 Commissioners and the Chairman.

(c) A vacancy in the office of any Reapportionment Commissioner shall be filled by appointment and the commission of the Governor from among 3 qualified electors of the same geographical subdivision of the State as that of the Reapportionment Commissioner whose office shall have become vacant, who shall be nominated by the State Chairman of the same political party who nominated the Commissioner whose office shall have become vacant. A vacancy in the office of Chairman of the Reapportionment Commission shall be filled by the Reapportionment Commission itself.

§ 605. *Action by Reapportionment Commission; Approval or modification thereof; Publication of final report*

(a) By and with the aid of such experts and advisers as they shall require, the Reapportionment Commission shall reapportion and redistrict the several Representative Districts in accordance herewith, and shall deliver a separate report as to the reapportionment and redistricting of the House of Representatives to both Houses of the General Assembly within 120 days following the effective date of this Chapter, and, thereafter, within 120 days following the official reporting by the President of the United States of each succeeding Federal Decennial Census. If the General Assembly is not then in session, the Governor shall call it into special session to receive such report.

(b) The General Assembly, within 30 calendar days following receipt of any such report, by joint resolution of both Houses, may correct, alter, revise, amend or otherwise change, in whole or in part, any such report.

(c) If the General Assembly shall take no such action with respect to any such report within said period of 30 days, then such report shall be conclusively deemed to be the will and enactment of the General Assembly, and the Governor, within 10 days, Sundays excepted, from the expiration of said period of 30 days, shall approve or disapprove such report and shall forthwith advise the General Assembly in writing of his approval or disapproval. If the Governor shall fail to approve or disapprove such report within such 10-day period, or upon the express approval of the Governor, or when passed over his disapproval, such report shall be a final report and binding until the next Federal Decennial Census.

(d) If the General Assembly should correct, alter, revise, amend, or otherwise change any such report, in whole or in part, as aforesaid, then such report as thus corrected,

altered, revised, or amended, or otherwise changed, shall be conclusively deemed to be the will and enactment of the General Assembly and, upon the approval of the Governor, or, when passed over his disapproval, shall be a final report binding until the next Federal Decennial Census.

(e) A copy of each such Final Report shall then be filed with the Secretary of State, who shall cause copies thereof to be published in a newspaper of general circulation published in each of the three Counties once a week for two consecutive weeks, within a period of 20 days after each such report became final, as aforesaid. The Secretary of State shall cause a copy of any such Final Report to be published in the next volume of the Session Laws of the State of Delaware.

§ 606. *Reapportionment and redistricting rules for the House of Representatives*

Each succeeding reapportionment and redistricting shall be done in conformity with the following rules:

(a) Each Representative District shall be formed of contiguous territory.

(b) Each Representative District shall be as nearly equal in population as possible to the other Representative Districts throughout the State, and any deviation therefrom to be only such as is required, as a practical matter, by the geography and mathematics of the situation.

(c) In no case should any Representative District be so laid out as to have a population which is more than 1½ times the population of any other Representative District throughout the State.

(d) Any Representative District requiring no change in boundary lines by reason of any change in its population quotient shall be reestablished according to its prior

boundary lines with as little change therein as is practicable.

(e) Each Representative District shall be bounded, so far as possible, by ancient boundaries, major roads and streets, streams, existing election district boundaries, or natural boundaries other than those above suggested.

(f) Each Representative District shall be so created as not to favor unduly any person or political party.

§ 607. *Time for Filing Mandamus or Other Proceeding*

Any mandamus or other proceeding:

(a) to compel performance of the reapportionment and redistricting duties of any Reapportionment Commission shall be filed within 60 days of the expiration of the period of time within which any Reapportionment Commission is required to act;

(b) to correct any error in any Final Report shall be filed within 60 days after the date on which any such Final Report is first published by the Secretary of State in a newspaper of general circulation.

Section 2. If the occasion should arise for the interpretation of any provisions of this Act, it should be interpreted so as to effect the aims spelled out in the "Second Report of Delaware's Bipartisan Committee upon a Plan for the Reapportionment of its General Assembly and for the Convening of a Delaware Constitutional Convention", dated June 19, 1963, insofar as said report has reference to the apportionment of the House of Representatives.